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**THE POWERS AND FUNCTIONS OF THE PARDONS BOARD  
IN MALAYSIA - A REVIEW**

by

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of the requirements for the Degree of Master of Laws  
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## PREFACE

'Once a person is sentenced to death by the Supreme Court or a death sentence is affirmed by the Supreme Court, he will definitely be hanged' - this statement reflects the views of many people. This is because all legal channels of appeal have been exhausted. This is in fact untrue. The prisoner has yet another avenue of appeal - to the Pardons Board.

The existence of Pardons Boards, let alone their constitutions and procedural requirements, are not commonly known to a layman. The people who are aware of their existence are usually confined to the legal profession generally, but particularly those who have direct contact with the cases on appeal to the Pardons Boards and those from the prisons' authorities. They are the ones who are directly involved in the process of any petition for pardon by way of recommending a pardon or otherwise, assessing the attitude and behaviour of prisoners as candidates for pardon, and their progress in every aspect. Apart from this minority group of people the Pardons Boards are "invisible and unheard of."

Even for those who know of the existence of Pardons Boards in Malaysia, they are unaware of the actual powers and functions of the Pardons Boards as these are not clearly defined in any statute and very few queries are ever directed at the functioning of these Pardons Boards.

Nevertheless, because the role of the Pardons Boards can be found in the constitution itself, it is for that reason I find it a worthwhile project to study its functions.

It is with these factors in mind that I have chosen the topic for this dissertation as "The Powers and Functions of the Pardons Board in Malaysia - A Review."

This thesis sets out to examine the nature, powers and functions of the Pardons Boards, the procedures governing the exercise of the power of pardon and also the anomalies, consequences and problems associated with the implementation of Article 42 of the Federal Constitution, an Article which confers and regulates the exercise of the power of pardon in Malaysia. For a comparative analysis, a chapter is included setting out the exercise of the power of pardon in other countries.

Having regard to the subject matter of this thesis generally and the collation of data specifically I encountered a number of problems.

Firstly, very little writings locally, can be identified in this area. In addition to that, no 'first-source' data is available and therefore, almost all of the information in this thesis with regard to the position in Malaysia has been obtained through interviews and sending questionnaires to various people.

The second major problem was the difficulty involved in getting interviews as the people concerned had busy schedules, and most of the people I have spoken to did not wish to be cited as a source.

It is hoped that this dissertation will clarify and improve understanding with regard to the powers and functions of the Pardons Boards. This work covers the relevant law and events in Malaysia as at 15th July 1989. The statistics cover appeals made to the various Pardons Boards as at 31 July 1988.



## My warmest ACKNOWLEDGEMENTS

This dissertation is in partial fulfilment of my Masters of Law degree. In completing it, I have had the benefit of consulting and getting the advice of a number of persons. In particular, my deepest gratitude go to Professor Molly Cheang, my supervisor, for her tireless encouragement and advice.

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7. K.M. Hanowari v State of Bombay AIR (1961) SC 112

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11. Yi v Lim Hong Seah (1978) 1 M.L.J. 66

12. Public Prosecutor v Lim Hong Seah (1979) 2 M.L.J. 170

13. Sip Eie Gien v Superintendent of Pudu Prison & Ors  
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14. State v Keesa Hanakshay Hanowari AIR (1960) Box 502  
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6. Criminal Procedure Code, sections 281, 281(b)(1),(2), 281(c), 281(d)(2), 348(1), 350, 342-352.
7. Dangerous Drugs Act 1952, section 6B(1), 6B(3), 39A, 39B.
8. Essential (Security Cases)(Amendment) Regulations, 1975, regulations 2(1), 2(2), 29(1), 29(4).
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10. Federal Constitution Ordinance 1957, S. 2.
11. Federal Constitution of India, Articles 72, 74, 77(1), 161, 163, 165(1), 361
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13. Internal Security Act 1960, sections 57, 58, 59, 60, 61, 62.
14. Juvenile Courts Act 1947, section 16.
15. Kelantan Syariah Criminal Code 1985
16. Kidnapping Act 1961, sections 3(1), 2(1), 32(a)
17. Murder (Abolition of Death Penalty) Act 1965 of England
18. Penal Code (Amendment and Extension) Act 1976 Schedule, Part II, section 3(20)
19. Penal Code of India, sections 54, 55, 55A

20. Penal Code:-

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## CHAPTER I

### INTRODUCTION

#### A. DEFINITIONS OF 'PARDON' AND 'PARDONS BOARD'

The word 'pardon' is defined as meaning 'to forgive; to exempt from punishment; to erase guilt for.'<sup>1</sup> A pardon therefore, entails an exemption from punishment or the erasure of guilt. These two concepts are different in effect. An exemption from punishment does not necessarily erase a conviction and therefore the guilt of a person. It could mean that a person is exempted from the punishment which the courts have passed on him, but another punishment, normally of a less serious nature is substituted instead.

An erasure of guilt on the other hand has the effect of wiping out the conviction itself and consequently restores the accused person to the position he had been in before he was charged with the offence in question.

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1. New Webster's Dictionary of the English Language, pg. 1078. Mozley & Whiteley's Law Dictionary 10th ed Butterworth, defines pardon as an act by the sovereign in virtue of the prerogative or by Act of Parliament. Prerogative means the special power, preeminence or privilege which the Queen has, over and above other persons, in right of her Crown and independently of statutes and the courts.

The word 'board' is defined as 'a body of persons directing some activity.'<sup>2</sup> A Pardons Board therefore means a body of persons which directs the grant of forgiveness, exemption from punishment or erasure of guilt.

#### B. SCOPE AND OUTLINE OF STUDY

The object of this dissertation is to examine the powers and functions of the Pardons Boards in Malaysia. The establishment of Pardons Boards is prescribed under Article 42 of the Federal Constitution of Malaysia. It follows naturally that an analysis will be made regarding the meaning and effect of the provisions laid down in Article 42 as compared to the actual workings of the Pardons Boards. A comparative study of the exercise of the power of pardon in England and India is also made so as to enable one to assess the effectiveness or otherwise of the prevailing system in Malaysia.

This topic has been chosen as many people are in fact unaware of even the existence of Pardons Boards in Malaysia. Secondly, even for those who are familiar with the existence of the Pardons Boards, due to the confidentiality surrounding the proceedings, their knowledge of the nature, powers and functions of Pardons Boards may still be incomplete. Thirdly and most

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2. Ibid, pg. 170.

importantly, the grant of a pardon to a convicted person conveys to us the implication that a sentence, though confirmed or itself passed by the highest court of appeal in the land, (and in the Malaysian context this would be the Supreme Court) may not necessarily be carried out. The sentence is final and decisive as far as the legal system is concerned but yet the convicted person still has another channel of appeal, ie to the Pardons Board. Even though the grant of a pardon, commutation, reprieves, respites and all the other powers mentioned in Article 42 are not to be seen as a reversal of the judgment of the courts, nevertheless the fact remains that power is vested in some other executive authority who could actually change a final sentence passed by the courts. As such, it is indeed important to be apprised of the nature and powers of this 'powerful' executive authority. The power to grant a pardon in Malaysia rests with the Yang di Pertuan Agong, Rulers or Yang di Pertua Negeri of the States of Malaysia, depending on the type of offence and the place in which it is committed. The Yang di Pertuan Agong acts on the advice of a Pardons Board. So do the Rulers and Yang di Pertua Negeri of States, only that the advice of the various States Pardons Boards are binding upon the Rulers and Yang di Pertua Negeri, but theoretically not so on the Yang di Pertuan Agong.

Chapter IV analyses the statistics and data

This dissertation will essentially concern itself with the problems and procedures governing the invocation of the power of pardon vested in the various authorities as explained earlier. In particular, Chapter II traces the history or origins of the pardoning power in England and the rationale behind it. The need to examine the power in England has arisen for two reasons. Firstly there is hardly any documented evidence as to the origins of the power in Malaysia. Secondly due to the historical fact that Malaysia or Malaya, as it was before, was a British colony for a long time until it attained independence in 1957, there exists the need to study the origins of the prerogative of mercy in England to see the extent of its influence and application over the origins of the pardoning power in Malaysia.

#### C. LIMITATIONS

Chapter III deals with the current situation in Malaysia. It purports to examine the theoretical framework of the law providing for the functioning of the Pardons Boards as well as the practical aspects and related problems in implementing the law. This chapter also lists down the types of offences that normally constitute the subject-matter of appeal to the Pardons Boards. It is insisted. They appear shortly. The feedback



Chapter IV analyses the statistics and data relating to the number of appeals made to the Pardons Boards and the different results thereof. These statistics relate to convictions under the different types of statutes.

Chapter V focuses on the exercise of the power of pardon in India and England and comparisons are drawn with that prevailing in Malaysia.

Chapter VI summarises and reviews the more important issues raised in the earlier Chapters. Suggestions aimed at improving the functioning of the system have also been incorporated

### C. LIMITATIONS

There are practical difficulties encountered in a research into an area such as the present one. A fair amount of information seems to be shrouded in "secrecy." At times, no information was forthcoming at all. A major point of note is as to the details in relation to the procedures taken, as soon as an appeal to the Pardons Board is initiated. They appear sketchy. The feedback



from interviews conducted with several people who may have first-hand knowledge about the procedures involved, was minimal. There seems to be a reluctance to discuss details as to the proceedings in the Pardons Board. Written sources on this subject are scarce. As a result much of my research had to be done through the sending of questionnaires, conducting interviews and conversations with people involved in the procedure.

All the issues raised and discussed represent the extent of information available to the writer at the material time. Consequently, there may be other aspects which could have been omitted in this thesis.

A prerogative means a peculiar right or privilege,<sup>1</sup> and in Great Britain today, it seems that a royal prerogative is theoretically subject to no restrictions: it is the power of God acting upon earth, where the Sovereign has become the sole fountain of justice.

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<sup>1</sup> Concise Oxford Dictionary.

## CHAPTER II

### HISTORY

#### A. ENGLAND

##### (a) Anglo-Saxon Period

The Kings and Queens of England have always promised that justice in the country shall be 'administered in mercy.' Legal historians have traced the royal pardon to the laws of Edward the Confessor, whereby the King used the 'royal prerogative of mercy' as part of the power of the Sovereign of his pure grace to show mercy to an offender by mitigating or removing the consequences of conviction.

A prerogative means a peculiar right or privilege,<sup>1</sup> and in Great Britain today, it seems that a royal prerogative is theoretically subject to no restrictions; it is the power of God acting upon earth, where the Sovereign has become the sole fountain of justice.

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1. Concise Oxford Dictionary.

The starting point of the royal pardon may be traced to the first significant period in the history of England ie the invasion of England by the Anglo-Saxons up until the Norman Conquest. The Anglo-Saxons invaded England in the fifth century in a piecemeal fashion. These Anglo-Saxons together with the Norman Kings laid the foundations of the modern legal order that is prevalent in England today. The Anglo-Saxons destroyed all traces of the then existing legal order and replaced it with institutions which were Germanic in nature.

This community limited private feuds as a whole by inducing the wrongdoer to offer, and the injured parties to accept, compensation for the wrong; and a large part of the extant laws of the Anglo-Saxon Kings is occupied in laying down a minute tariff compensation (bot) for injuries, based on the extent of the wrong done and the rank of the sufferer.

If compensation is refused the law has no means to enforce its payment. The most that the law court can do was to assist the injured party by declaring the wrongdoer an 'outlaw', whereby he may be pursued and slain by anyone with impunity like a wild beast. Even in those times there were many offences which could not be completely atoned for by compensation paid to the sufferer. A fine (wite) was also payable to the king through the medium of his officer the sheriff.

Further, and this was of great importance to the future, in the later Anglo-Saxon periods there were some offences which no compensation could wipe out. They were 'botless,' were punishable with death or mutilation and the property of the offender were forfeited to the King. Naturally from the point of view of the royal finances, it was desirable that the number of 'botless' offences should be maintained and if possible, extended.

anywhere was a breach of the King's peace though the King was not. Thus in the laws of Canute it is laid down that the rights which the King enjoyed over all men were breaches of the King's peace, house-breaking, ambush and many others.

There is intimate connection in English history between these early forms of punishment and the doctrine of the King's peace. (This doctrine of the King's peace later gave birth to the royal prerogative of mercy.) In Canute's day the 'King's Peace' did not extend to all places at all times. At first every house had its own peace and so had every Church. There was a peace for each township. If the peace of a man's house was broken, a bot must be paid. So too if a lord's peace was broken in his manor.



Finally, The next step was to treat the King's peace as independent. If the King was dining in A's house, and B broke the peace, a bot must be paid to A, and a fine to the King. The King's peace was more extensive than that of others. Gradually the idea emerged that any peace not specially under any other peace, was in the King's peace. Finally, the King's peace absorbed all other peace, and became an all-embracing atmosphere. An act of violence anywhere was a breach of the King's peace though the King was not in any way directly affected by it.

The notion that "the King never dies" and "the throne is never vacant," gave continuity to the King's peace, and a new meaning to the allegation "against the King's peace" in every indictment. The King now became equivalent to the State, and "against the King's peace" implied that the wrong was against the State; a public wrong.<sup>2</sup>

#### (b) The Norman Period 1066-1154

It was under the Norman Kings' reign, particularly Henry II, that anti-social conduct came to be categorised into torts and crimes, the former still to be redressed (or forgiven) at the choice of the victim or his

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2. P.K. Sen, Penology Old and New, London, Longmans, 1943 pg. 2.



family, but the latter to be punished (or forgiven) always in the name of the Crown. That was how the royal prerogative of mercy came about. The sovereign showed mercy to an offender by mitigating the severity of the punishment imposed or by lifting the punishment altogether.

Notionally the royal prerogative extended to the right of sending and receiving ambassadors, making treaties, war, concluding peace, conferring honours, commissioning officers in the Army and Navy, choosing Ministers of State, summoning Parliament and refusing assent to a Bill.<sup>3</sup>

Sir William Blackstone, a legal historian, described the King as 'a magistrate who had it in his power to extend mercy when it was deserved, holding a court of enquiry in his 'own breast.'<sup>4</sup>

Only the Sovereign could forgive a crime. Later on his mercy was partially delegated to the judges, and only when they failed, either because they have been deceived or misled into doing injustice, that the King could still be moved to employ his prerogative and confer his pardon.

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3. C.H. Rolph, *The Queen's Pardon*, London, Cassell, 1978 pg. 17.

4. Ibid.

If the judges had before them a man who had been declared by a jury to have killed, 'they do not acquit him nor can they pardon him, they bid him hope for the King's mercy,'<sup>5</sup>

The reason as to why it was essential that such final redress was available was due to the inflexibility of the punishments used, and their irreversible nature. All the serious crimes were called felonies and their fixed and only punishment was death. In these instances, the King was the 'injured party' and thus only he could decide whether life and limb could be spared.

#### (c) The Early Angevins 1154-1215

In the Norman period the criminal law was still in a very primitive condition, but in the period of the Early Angevins, when Henry II was King, the criminal law had taken on a new form in which one can see the traces of the modern system now prevailing in England.

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5. Pollock and Maitland, The History of English Law, Cambridge University Press, Vol. II, pg. 496.

During this period the royal court held the centre of the stage. Any act of serious violence wherever and whenever committed would constitute a breach of the King's peace, punishable by the King's judges. It was to the King's court then that the people had to go for security and redress. It followed that prosecution was also at the suit of the King and not merely at the suit of the injured party.

#### (d) England from the fourteenth century

By the fourteenth century, the relief of royal pardon had become a discreet affair. At times it was also "dishonest," simply because the granting of a pardon was set in motion by those who had money. In consequence, a statute was passed declaring that killing was not pardonable except where it was done in self-defence or by misadventure. Pardons that were obtained by untrue representations were held void.

According to Sir William Holdsworth's History of English Law, by the end of the fifteenth century the royal power to pardon was confined to cases in which the offence was merely "malum prohibition", that is, wrong because the law said so. With malum in se, (wrong in itself) neither the King nor any other can theoretically dispense pardon and yet when the offences have been committed the King may

pardon them. The release of a forfeiture can only be done after it has been incurred and not before. Quoting a judge's ruling in 1946, Holdsworth added that "neither King nor priest can give licence to permit fornication. But after it has been committed they can pardon it."<sup>6</sup>

By the sixteenth century, Henry VIII enacted the Jurisdiction in Liberties Act 1535 which inter alia, extinguished the power of the Church and the great landowners to grant pardons at all. Thus for the first time the royal prerogative in the statutes was established.

In the sixteenth, seventeenth and eighteenth centuries the royal pardon was in fact being granted rather freely. For instance, in 1678 a Chief Minister was impeached in the House of Lords for treasonable dealings with France. The House, who regarded the King as the principal 'traitor', wanted to impeach the King. However, finding that Kings could not be impeached, they turned their wrath upon the Chief Minister. The King then appeared before the House of Lords to say that he had given the Minister a 'free pardon' and subsequently dismissed him from office. Consequently all investigations into the King's own conduct were frustrated by his employment of the prerogative of mercy.

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<sup>6</sup>. Holdsworth, History of English Law, London, Methuen, 1966 Vol. II, pg. 218.



To ensure the same situation did not happen again, in 1700 Parliament provided in the Act of Settlement that a royal pardon could not be pleaded in bar of impeachment. But in actual fact, there is nothing to prevent the sovereign from pardoning after the impeached person has been convicted and sentenced.

"Surviving also into this period was the absurd historical convention, an aspect of the 'divine right' conveniently protecting King and Church, that the King and his courts could not condemn a member of the clergy. Although they could try him and find him guilty, or even hear him describe himself as guilty, he must then be accorded his 'benefit of clergy' and be handed over to the Church for his punishment. And the Church, more often than not, failed to punish him at all. It was a good time to be a cleric."<sup>7</sup>

Whenever the jury passed a verdict of 'guilty' and the officer of the court asked the accused if he had anything in his favour so that the death sentence be lifted, he claimed his benefit of clergy.<sup>8</sup> This required

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7. C.H. Rolph, *The Queen's Pardon*, London, Cassell, 1978 pg. 21, 22.

8. As the severity of punishments and the number of crimes in the courts increased, clergy or cleric came to mean 'clerk' in the sense of anyone able to write, and then of anyone able to read.

that he knelt in the dock, take the Bible in his hands and at least appeared to be reciting; but more often than not, reading, the first verse of the 51st Psalm.<sup>9</sup>

The 'benefit of clergy' was finally abolished in 1827. In its final stages of existence the practice had ridiculously reached a state whereby a totally illiterate prisoner could pay his gaoler a shilling (sometimes less) to teach him the 51st Psalm, so that when the moment came he could recite it in the dock and save his life.

From 1827 onwards those sentenced to death could save their lives by way of the 'conditional pardon', which entailed in their being sent off to the colonial plantations. It is not clear as to the details of their work at the plantations.

By 1830 the prerogative of mercy was to be exercised only on the advice of Ministers. These encroachments upon the royal power gradually put an end to the personal involvement of the sovereign in exercising the prerogative of mercy unasked, and made the Home Secretary responsible for advising its use.

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9. The 51st Psalm reads, "Have mercy upon me O God, according to thy loving kindness. According unto the multitude of thy tender mercies, blot out my transgressions."

11. This statement is the only one available as an account of the prevailing practice.

In 1874, the Home Office issued a memorandum<sup>10</sup> containing principles to be applied in matters pertaining to the royal prerogative of mercy. These were some of the principles:

- (1) The Home Secretary did not interfere with the administration of the law unless recommended to do so by the judge who had tried the case concerned, or on recommendations made to the Home Office (or to the Queen) on behalf of convicted persons on grounds which seemed to call for investigation. He usually "gave effect" to the judge's suggestion.
- (2) Remissions on merits were seldom granted except with the concurrence of the judge concerned.
- (3) A free pardon is granted only on legal grounds, or where there is ascertained innocence or a doubt of guilt.<sup>11</sup>

Until 1907, when the Criminal Appeal Act was passed, the Home Office was forced to become a 'Court of Appeal' in criminal cases. The Home Office had from time to time to review the whole of the evidence in the most difficult cases. It had to decide on the question whether the law should take its course or the alleged offender should receive either a free pardon or a conditional pardon. A conditional pardon

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10. Home Office Memorandum 33391, 1874. See also C.H. Rolph, *The Queen's Pardon*, pg. 28, 29.

11. This statement is the only one available as an account of the prevailing practice.

is where a death sentence is substituted for penal servitude.

By the end of the eighteenth century, free pardons would only be granted to those, who in the opinion of the Secretary of State, had suffered a wrongful conviction or whose innocence had been satisfactorily established.

The Home Office possessed none of the ordinary powers of a court of law. As such, in its inquiries, evidence could not be taken on oath, and witnesses could not be cross-examined, but not being bound by the technical rules of evidence meant the Home Secretary could obtain knowledge of facts which remained unknown to the courts. No one of course, knew what evidence was received or why alleged evidence was rejected because there was no public hearing.<sup>12</sup>

As a consequence of these irregularities the Court of Criminal Appeal was set up by virtue of the Criminal Appeal Act of 1907.<sup>13</sup> From then onwards the prerogative was not the only means available for miscarriages of justice.

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12. L. Radzinowicz, A History of English Criminal Law, London, Steven, 1948 Vol. I, pg. 122-124.

13. The Court of Criminal Appeal is currently the Criminal Division of the Court of Appeal.



## B. MALAYSIA

### (a) The Local Legal System

In the early years, Peninsula Malaysia was inhabited by aboriginal tribes which were divided into three main groups, the Negritos, Senois and Proto-Malays. The head of the tribes had full powers over his subjects. Every crime had its own punishment, but there is no mention of a criminal being absolved.

### (b) The Malacca Sultanate

Under Malacca laws in the fifteenth and the earlier part of the sixteenth centuries, the ruler was the source of law as well as being the fountain of justice. Penalties for crimes such as killing, stabbing, battery, robbery, theft and lying were determined by the ruler. In administering his own laws, the ruler was shown to be the highest court.<sup>14</sup> The ruler could grant pardons, the result of which would set an offender free of any penalties.

It is not known whether any form of the Malacca Sultanate was in existence then. It is arguable that the

Governor had absolute power at that time. Consequently,

14. This would be akin to the royal court that existed in England during the Norman period.

(c) The Portuguese Period

The Portuguese, under the leadership of Alfonso d'Albuquerque captured Malacca in 1511. The Sultan of Malacca was replaced by a Portuguese Governor and punishments that were meted out for any crimes were subject to the approval of the Governor himself. Presumably any power of pardoning was also exercisable at the instance of the Governor.

(d) The Dutch Period

The Dutch occupied Malacca in the middle of the seventeenth century until the end of the eighteenth century. During this period, Malacca was also headed by a Governor, who had supreme authority in all matters. It seemed that the Dutch only applied Dutch law to the Dutch population and left the natives to their own laws. It is not known whether any form of the Malacca Sultanate was in existence then. It is arguable that the Governor had absolute power at that time. Consequently, the power of pardoning a criminal would lie in his hands, if any.

(e) The British Period 1957

The British took possession of Penang, Malacca and Singapore by 1825. Throughout the latter half of the nineteenth century and the early stages of the twentieth century, English statutes and Ordinances were being adopted in Malaya. The effect of this legislation was to replace the former Malay-Muslim laws by enactments based on principles of English law.

In 1896, Courts of Residents and Sultans in Council, to whom appeals were previously made to, were abolished. Their place was substituted with the Judicial Commissioner, who then became the final Court of Appeal for the Federation. They were appointed by the Sultans with the consent of the residents.<sup>15</sup> Whether the Sultan still had his royal power of pardon is not known but one is tempted to think that if an appeal to the Commissioner is rejected, the Sultan could still be moved to exercise his power of pardon.

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15. Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, Kuala Lumpur, Dewan Bahasa dan Pustaka, 1987 pg. 7-29.

16. *Constitution Ordinance 1957* (No. 3 of 1957), S. 2.

17. *The Prerogative in Malaysia* (1973) 17 Mal. L.R. pg 297.

18. *Ibid*, pg 313.

(f) The position after 1957

The Federation of Malaya secured her independence from Great Britain in 1957. A new Constitution was approved and had the force of law throughout the Federation from the thirty first day of August, 1957.<sup>16</sup>

In an article in 1975, Professor Hickling<sup>17</sup> argued that the prerogative exists in Malaysia. He argued that in the territories such as Penang, Malacca, Sarawak and Sabah, over which the Crown had direct government, the existence of prerogative powers were as extensive as those in England, and that they duly devolved on independence upon the appropriate successor authority.

In relation to the Malay States Professor Hickling argues that:

"Given an inheritance of the common law of England, therefore, coupled with a transfer of power on independence, it is logical to assume that on 31 August, 1957 there was a transfer from the Crown of both major and minor prerogatives; and the transferee of such prerogatives must have been, at the federal level, the Yang di Pertuan Agong and, to such extent, as they affected the Malay States, the Malay Rulers."<sup>18</sup>

16. Federal Constitution Ordinance 1957 (No. 5 of 1967), S. 2.

17. The Prerogative in Malaysia (1975) 17 Mal. L.R. pg 207.

18. Ibid, pg 213.



A contrasting view was propounded by A.J. Harding.<sup>19</sup> Whereas Professor Hickling argues that prerogatives exist under the cover of the Malaysian Constitution, A.J. Harding is of the view that the effect of the introduction of the Constitution on 31 August 1957 was that important redistributions of legislative, executive and judicial power were made. He observed as follows,

"Her Majesty's prerogatives ceased to apply, insofar as they had applied, and to the different extents to which they applied (if at all), to the states which joined the Federation. The Head of that Federation was the Yang di Pertuan Agong; he occupied an office which had never previously existed ... The prerogatives of the Crown at common law merely lapsed when the Malaysian flag was raised in Kuala Lumpur on 31 August 1957, and the Yang di Pertuan Agong owes nothing to Her Majesty by way of succession."<sup>20</sup>

Whichever view is adopted, the main point is that prerogatives do exist in Malaysia, whether by way of devolution or created and governed by the Constitution.

<sup>19</sup>. Monarchy and the Prerogative in Malaysia (1986) 28 Mal. L.R. pg 345.

<sup>20</sup>. Ibid, pg. 353-4.

In relation to the power of pardon, under Article 42 of the Constitution the Yang di Pertuan Agong and the Ruler or the Yang di Pertua Negeri have the power to grant pardon for certain offences committed in specified territories. 1 of the Federal Constitution

It may not be accurate to say that the idea of the royal pardon in Malaysia today was imported from England, seeing that as early as the sixteenth century the Sultans of Malacca had already exercised the royal power of pardon. Constitution provides a convicted criminal with a last chance of having his sentence reviewed and hopefully. Nevertheless, it is felt that the idea to include the royal power of pardon in the Federal Constitution and consequently, retaining the existence of such a power was to a large extent influenced by the British royal prerogative of mercy. Factors governing the occasions as to the hows and whens the power of pardon may be exercised differ in order to suit local circumstances.

(1) The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur and Labuan; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.

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1. The Federal Constitution Ordinance 1957, s. 2.

### CHAPTER III

#### THE PRESENT SYSTEM

##### A. THE LAW

##### (a) Article 42 of the Federal Constitution

The Federation of Malaya secured her independence from Great Britain in 1957. A new Constitution was given to this new State, which was to have the force of law throughout the Federation on and after the 31st August 1957.<sup>1</sup> The Constitution provides a convicted criminal with a last chance of having his sentence reviewed and hopefully, reduced; by vesting the power of pardon in the Yang di-Pertuan Agong and the Rulers of the States in Malaysia.

The relevant provision is Article 42, which reads:

(1) The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur and Labuan; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.

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1. The Federal Constitution Ordinance 1957, s. 2.

(2) Subject to Clause (10), and without prejudice to any provision of federal law relating to remission of sentences for good conduct or special services, any power conferred by federal or State law to remit, suspend or commute sentences for any offence shall be exercisable by the Yang di-Pertuan Agong if the sentence was passed by a court-martial or by a civil court exercising jurisdiction in the Federal Territories of Kuala Lumpur and Labuan, and in any other case, shall be exercisable by the Ruler or Yang di-Pertua Negeri of the State in which the offence was committed.

(3) Where an offence was committed wholly or partly outside the Federation or in more than one State or in circumstances which make it doubtful where it was committed, it shall be treated for the purposes of this Article as having been committed in the State in which it was tried. For the purpose of this Clause the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan, as the case may be, shall each be regarded as a State.

(4) The powers mentioned in this Article -

(a) are, so far as they are exercisable by the Yang di-Pertuan Agong, among functions with respect to which federal law may make provision under Article 40(3);

(b) shall, so far as they are exercisable by the Ruler or Yang di-Pertua Negeri of a State, be exercised on the advice of a Pardons Board constituted for that State in accordance with Clause (5).



(11) For the purpose of this Article, there

(5) The Pardons Board constituted for each State shall consist of the Attorney-General of the Federation, the Chief Minister of the State and not more than three other members, who shall be appointed by the Ruler or Yang di Pertua Negeri; but the Attorney-General may from time to time by instrument in writing delegate his functions as a member of the Board to any other person, and the Ruler or Yang di-Pertua Negeri may appoint any person to exercise temporarily the functions of any member of the Board appointed by him who is absent or unable to act.

(6) The members of a Pardons Board appointed by the Ruler or Yang di-Pertua Negeri shall be appointed for a term of three years and shall be eligible for reappointment, but may at anytime resign from the Board.

(7) A member of the Legislative Assembly of a State or of the House of Representatives shall not be appointed by the Ruler or Yang di-Pertua Negeri to be a member of the Pardons Board or to exercise temporarily the functions of such a member.

(8) The Pardons Board shall meet in the presence of the Ruler or Yang di-Pertua Negeri and he shall preside over it.

(9) Before tendering their advice on any matter a Pardons Board shall consider any written opinion which the Attorney-General may have delivered thereon.

(10) Notwithstanding anything in this Article, the power to grant pardons, reprieves and respites in respect of, or to remit, suspend or commute sentences imposed by any Court established under any law regulating Islamic religious affairs in the State of Malacca, Penang, Sabah or Sarawak or the Federal Territories of Kuala Lumpur and Labuan shall be exercisable by the Yang di-Pertuan Agong as Head of the religion of Islam in the State.

(11) For the purpose of this Article, there shall be constituted a single Pardons Board for the Federal Territory of Kuala Lumpur and the Federal Territory of Labuan and the provisions of Clauses (5), (6), (7), (8) and (9) shall apply mutatis mutandis to the Pardons Board under this Clause except that reference to "Ruler or Yang di-Pertua Negeri" shall be construed as reference to the Yang di-Pertuan Agong and reference to "Chief Minister of the State" shall be construed as reference to the Minister responsible for the Federal Territory of Kuala Lumpur and the Federal Territory of Labuan.

(a)(i) Offences Triable by court-martial

There are three services of regular forces in Malaysia, "The Malaysian Army", "The Royal Malaysian Navy" and "The Royal Malaysian Air Force." The armed forces, as they are called, are governed by the Armed Forces Act 1972.<sup>2</sup> (hereinafter: the Act).

Any person who is subject to service law under the Act shall be tried and duly sentenced by a court-martial in accordance with the provisions of the Act.<sup>3</sup>

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2. Act 77.

3. Armed Forces Act, 1972, s. 103(1).

The court-martial is a 'military court', which consists of the president and not less than two other officers. The panel of 'judges' vary according to the rank of the accused.<sup>4</sup>

Offences that are triable by court-martial are laid down in Part V of the Act. They relate to offences in respect of military service,<sup>5</sup> mutiny and insubordination,<sup>6</sup> failure to perform military duties,<sup>7</sup> offences relating to property,<sup>8</sup> offences relating to, or by, persons in custody,<sup>9</sup> navigation and flying offences,<sup>10</sup> offences relating to service tribunals<sup>11</sup> and other miscellaneous offences<sup>12</sup> such as falsifying service documents and making false accusations.

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4. Ibid, s. 105.

5. Ibid, ss. 38-46.

6. Ibid, ss. 47-53.

7. Ibid, ss. 54-60.

8. Ibid, ss. 61-63.

9. Ibid, ss. 64-67.

10. Ibid, ss. 68-74.

11. Ibid, ss. 75, 76.

12. Ibid, ss. 77-78.

14. Federal Constitution, Article 41.

15. Ibid, Art. 137.

16. See Armed Forces Act, s. 175.

It is in relation to these offences that the Pardons Board may exercise jurisdiction.<sup>13</sup> Only the Yang di-Pertuan Agong has the power to pardon a person tried and sentenced by a court-martial. This power is also extended to the granting of remission, suspension or commutation. The reason the Yang di-Pertuan Agong is given the power of pardon for court-martial cases is because he is the Supreme Commander of the armed forces of the Federation.<sup>14</sup> The command, discipline and administration of the armed forces are all under the general authority of the Yang di-Pertuan Agong.<sup>15</sup> He plays two main roles in determining the fate of a person sentenced by a court-martial.

Firstly, as one of the reviewing authorities which, upon a petition, reviews a finding or sentence of a court-martial; and secondly as head of the Pardons Board hearing the same petition.

It is felt that the Yang di-Pertuan Agong (if not in fact, in theory) must face a conflict in these situations. If a petition to the reviewing authority<sup>16</sup> fails, which means that the Yang di-Pertuan Agong

13. See discussion below as to whether the Pardons Board really has jurisdiction over this matter.

14. Federal Constitution, Article 41.

15. Ibid, Art. 137.

16. See Armed Forces Act, s. 128.



has agreed not to quash the finding or the sentence, a further appeal to the Pardons Board would not provide much help to the petitioner as it would be very unlikely that the Yang di-Pertuan Agong will then change his mind.

1972 provides:

Under the Act, a death sentence is not to be carried out unless it has been approved by the Yang di-Pertuan Agong.<sup>17</sup> Again here, once the Yang di-Pertuan Agong confirms the death sentence, it does not seem probable that the sentence would be changed if a petition were to be made to the Pardons Board. But nevertheless there is still the possibility of a pardon being granted. The sentence may be affirmed on the technicality of the law but a pardon is usually granted for humanitarian reasons. After all the whole idea of pardons is based on extra-legal and not legal, grounds. However this has yet to be seen as to date, no one has been sentenced to death under the Act.

A more puzzling question that arises in connection with the power of pardon of the Yang di-Pertuan Agong in respect of all offences which have been tried by court-martial is whether the Yang di-Pertuan Agong acts on the advice of a Pardons Board or a Ministry or some other body or persons.

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17. Ibid, s. 127.

Article 42, Clauses (5) and (6) of the Federal Constitution, and in general, the whole of Article 42 refer to State Pardons Board. Court-martial cases are not State matters. Section 103(1) of the Armed Forces Act 1972 provides:

Subject to the provisions of this section a court-martial shall have the power to try any person subject to service law under this Act for any offence which, under this Act is triable by court-martial and to award for any such offence any punishment authorised by this Act for such offence.

Therefore the question that arises is whether a Pardons Board comes into play at all in hearing a petition against a sentence passed by a court-martial. Should the answer be 'yes', the next question would be which Pardons Board? Members of this Pardons Board cannot be the same as those laid down in Clauses (5) and (6) as the Pardons Board referred to are the States Pardons Board. In the absence of any provision in the federal laws,<sup>18</sup> expressly stating that the Yang di-Pertuan Agong in

<sup>18</sup>. Article 40(3) of the Federal Constitution provides:

Federal law may make provision for requiring the Yang di-Pertuan Agong to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of any of his functions other than -

(a) functions exercisable in his discretion;

(b) functions with respect to the exercise of which provision is made in any other Article.

There is no provision stating that the Yang di-Pertuan Agong is to act on the advice of a Pardons Board in relation to court-martial offences.

exercising his power of pardon (in respect of court-martial cases), it seems that Article 40(1) will come into operation.

the advice of a Pardon Board, the Pardon Board would be ultra vires, reasons being, firstly, if it was a State ... Article 40(1) reads as follows: vires, because

court-martial cases are not State matters and therefore outside the Pardon Board's jurisdiction; secondly, if it was a

In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution ...

(a)(ii) Offences under the Internal Security Act, 1960<sup>19</sup>

As such, the conclusion is that the Yang di-Pertuan Agong, when exercising his power of pardon granted under Article 42 of the Federal Constitution, in relation to offences tried by a court-martial, shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet.<sup>19</sup>

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19. The Attorney-General has confirmed that for sentences passed by the military court, the Yang di-Pertuan Agong acts on the advice of the Cabinet. This actually, is an interpretation of statutory power, since to date, no petition for pardon in relation to a courts-martial case has ever been made to the Yang di-Pertuan Agong. 1977-A01

To take the argument further, if in actuality there existed past cases<sup>20</sup> where the Yang di-Pertuan Agong acted on the advice of a Pardons Board, the Pardons Board would be ultra vires, reasons being, firstly, if it was a State Pardons Board it is ultra vires because court-martial cases are not State matters and therefore outside the Pardons Board's jurisdiction; secondly, if it was a separate Pardons Board, since it is not governed by any law, this Pardons Board would be void.

(a)(ii) Offences under the Internal Security Act, 1960<sup>21</sup>

Until the 5th of October 1975, any pardon for offences under the ISA lie with the Rulers of the States. It is only after the enactment of the Essential (Security Cases) Regulations, 1975, which was effective from the 5th October 1975 that the power to pardon offences under the ISA lies with the Yang di-Pertuan Agong.

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20. This is just an assumption. The writer does not have any statistical records to support her argument.

21. Hereinafter referred to as ISA, 1960 (Revised 1972-Act 82).



A 'security offence' means an offence (whether committed before or after the commencement of these Regulations) against sections 57, 58, 59, 60, 61 or 62 of the Internal Security Act, 1960, or any offence against any other written law the commission of which is certified by the Attorney-General under paragraph (2) to affect the security of the Federation.<sup>22</sup>

It is further provided<sup>23</sup> that:

... the power of the Yang di-Pertuan Agong to grant pardons, reprieves and respites or to remit, suspend or to commute sentences under Clauses (1) and (2) of Article 42 of the Constitution shall extend to all security offences wherever committed or tried and such extended power shall be exclusively exercisable by him notwithstanding however the provisions of any written law to the contrary."

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22. Essential (Security Cases)(Amendment) Regulations, 1975, reg. 2(1), P.U.(A) 362/75 w.e.f. 5th October 1975. (hereinafter referred to as ESCAR)

23. Ibid. Regulation 29(1).

24. ESCAR, 1981: P.U.(A) 204/81.

25. ESCAR 1975, reg. 2(2), P.U.(A) 362/75.

Regulation 29(2)<sup>24</sup> states:

"The power conferred upon the Yang di-Pertuan Agong by virtue of paragraph (1) shall be exercised on the advice of a Pardons Board constituted for security offences wherever committed or tried, and the provisions of Clauses (5), (6), (7), (8) and (9) of Article 42 of the Constitution shall apply mutatis mutandis to the Pardons Board, except that reference to 'Ruler or Yang di-Pertua Negeri' shall be construed as reference to the Yang di-Pertuan Agong and reference to 'Chief Minister of the State' shall be construed as reference to the Prime Minister."

It is provided<sup>25</sup> that:

"Where the commission of any offence against any written law other than sections 57, 58, 59, 60, 61 and 62 of the Internal Security Act, 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these Regulations."

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24. ESCAR, 1981: P.U.(A) 206/81.

25. ESCAR 1975, reg. 2(2), P.U.(A) 362/75.

Consequently, the current position is that the Yang di-Pertuan Agong has the power to grant pardons, reprieves and respites or to remit, suspend or commute sentences which have been tried by court-martial, for all offences committed in the Federal Territories of Kuala Lumpur and Labuan, for offences under sections 57, 58, 59, 60, 61 and 62 of the ISA 1960 and sentences imposed by the Syariah Courts in the States of Malacca, Penang, Sabah, Sarawak or the Federal Territories of Kuala Lumpur and Labuan.<sup>26</sup>

This power to grant pardons extends to juvenile offenders too. In relation to the death sentence, the general rule is that a death sentence cannot be imposed on a juvenile offender who is found guilty of an offence punishable with death.

This is provided for in section 16 of the Juvenile Courts Act 1947 which reads:

"Sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a juvenile..."

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26. Clause (1) of Article 42 of the Constitution. See discussion below under The Islamic Perspective.

28. See above, p. 25.

However this exception will not apply to a juvenile who is charged with a security offence. Regulation 3(3) of the ESCAR expressly excludes the application of the Juvenile Courts Act 1947 where the offender is charged with a security offence.

An authority for this is the case of P.P. v Lim Hang Seoh,<sup>27</sup> where a boy of 14 years at the time of the commission of the offence was sentenced to death by the High Court after being found guilty of the possession of firearms under section 57 of the ISA, and thus a security offence by virtue of Regulation 2 of ESCAR. On appeal to the Pardons Board for security offences, the Yang di-Pertuan Agong commuted his sentence to one of detention at the Henry Gurney School until he reached the age of 21 years.

Apart from the above-mentioned sections under the ISA, 1960, appeals against sentences for all other offences (under the ISA, 1960) may be made to the State Pardons Board in accordance with Clauses (1) and (2) of Article 42 of the Constitution, subject of course, to Regulation 2(2) of ESCAR.<sup>28</sup>

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27. [1978] 1 M.L.J. 68. See also Mimi Kamariah Majid, *Criminal Procedure in Malaysia*, pg 295-6.

28. See above, n. 25.



(b) Jurisdiction

The jurisdiction or powers of a Pardons Board, be it a State Pardons Board constituted under Article 42 of the Constitution or a Pardons Board constituted under the Essential (Security Cases) Regulations, 1975, is only advisory in nature.

In Sim Kie Chon v Superintendent of Pudu Prison & Ors,<sup>29</sup> the Supreme Court said that the function of a Pardons Board is merely to tender advice and not to commute sentences.

As such, the jurisdiction of a State Pardons Board would be to tender advice to the Ruler or Yang di-Pertua Negeri in respect of petitions of mercy for all offences committed in that state, with the exceptions of offences which have been tried by court-martial and security offences. For the Federal Territories of Kuala Lumpur and Labuan, advice of the Pardons Board will be tendered to the Yang di-Pertuan Agong.

(b)(i) Comments

There seems to be an inconsistency between the function of the Pardons Board and Clause (8) of Article 42. As stated above, the Pardons Board only tenders

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29. (1985) 2 M.L.J. 385.

advice to the Yang di-Pertuan Agong or Ruler, as the case may be. At the same time, by virtue of Clause (8), the Yang di-Pertuan Agong or Ruler himself is required to preside over the proceedings.<sup>30</sup> As things stand, one would have thought that the Pardons Board would meet and discuss and thereupon reach a 'decision'. This 'decision' would then be presented to the Yang di-Pertuan Agong or Ruler, as the case may be, for His Highness' consideration. But this is not the case. Apparently the Yang di-Pertuan Agong or Ruler participates in the discussion. Therefore the function of the Pardons Board as an advisory body would only remain so in theory. This is because when the Yang di-Pertuan Agong or Ruler actively participates in the whole process; and by presiding over the Board he would just be doing that; the supposedly separate functions or powers of the Yang di-Pertuan Agong or Ruler (which is the power to grant pardons or reduce the sentence of a petitioner)<sup>31</sup> and the Pardons Board, (which is only to tender advice) becomes blurred. Any advice that is tendered to the Yang

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30. In response to questionnaires sent to the State Secretaries of Selangor, Perak and Kelantan, all three states adhere to clause (8) of Article 42. The same provision is laid down in LX(7) of Undang-Undang Tubuh Kerajaan Selangor, 1959.

31. See Clauses (1) and (2) of Article 42 of the Constitution, above.

di-Pertuan Agong or Ruler is not final, in the sense that that advice may or may not be adhered to by the Yang di-Pertuan Agong or Ruler in exercising his power of pardon. The inconsistency may arise if the Yang di-Pertuan Agong or Ruler chooses to exercise his powers under Article 42(1) and (2) against the advice of the Pardons Board. In theory, the Pardons Board will not be able to do anything since it would be outside their powers to interfere. But in practice, the Pardons Board may reopen the discussion and convince the Yang di-Pertuan Agong or Ruler to adopt their advice.

(c) Composition<sup>32</sup>

(c)(1) A Pardons Board constituted under Article 42 has, as its members, persons stipulated by Clause (5) of Article 42. <sup>(see Responses)</sup> As for the other three members which are not fixed, so long as they are not a member of a Legislative Assembly of a State or of the House of Representatives, they will qualify to sit on the Pardons Board.

32. The writer has written to obtain information as to who are the present members of the Pardons Board in some states, but answers have not been received. The only information that is given is that the members are as laid down in Clause (5) Art. 42.

33. The Straits Times, 14.10.1963.

34. The Straits Times, 3.11.1964. The Trengganu Pardons Board was constituted on 30.11.64.

35. Regulation 29(2).

For instance, in 1963, the Governor of Penang appointed three medical practitioners to serve on the State Pardons Board for three years.<sup>33</sup> In Malacca, two medical practitioners and another (whose profession was not stated) were appointed as members of the Pardons Board.<sup>34</sup> In Trengganu, three palace officials were appointed to become members of the State Pardons Board.<sup>35</sup>

A Pardons Board constituted under the Essential (Security Cases) Regulations, 1975,<sup>36</sup> has as its members; the Attorney-General, the Prime Minister and three other members, the appointment of which is subject to the provisions of Clauses (5), (6) and (7) of Article 42.

(c)(1) Comments

The Attorney-General is a permanent member of both types of Pardons Board. Undoubtedly this will lead to unfairness and prejudice by reason of the fact that the Attorney-General who was the Public Prosecutor technically in the main trial now participates as a member of the Pardons Board. The unfairness becomes more obtrusive when

33. The Straits Times, 25.11.1963.

34. The Straits Times, 14.10.1963.

35. The Straits Times, 3.12.1964. The Trengganu Pardons Board was constituted on 30.11.64.

36. Regulation 29(2).



the Pardons Board has to consider the written opinion of the Attorney-General before tendering any advice to the Ruler or Yang di Pertuan Agong.<sup>37</sup>

This very point was raised in Superintendent of Pudu Prison & Ors v Sim Kie Chon,<sup>38</sup> where the court responded by saying that this question was unarguable in view of the specific constitutional requirement to this effect in Article 42(5) and (9). By saying this, one cannot help but feel that the court was deliberately avoiding the issue. By taking such a stand it is submitted that the court failed to utilise the opportunity to critically examine the provisions of the Constitution in question.

In any case it is obviously and undoubtedly unfair for the petitioner that the "very official" who prosecuted him is now hearing his petition for a pardon. On the other hand there may be a cause to argue for the participation of the Attorney-General in the Pardons Board. It is because of his "bias" that he should sit on the Board, so he could give clear reasons as to why the sentence of the petitioner should not be altered. He is the only official there who "knows" the details in which the petitioner committed the crime. The counter-argument for this is that the idea of an appeal or a petition for

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37. Art. 42(9).

38. (1986) 1 M.L.J. 494.

pardon is based on extra-legal or humanitarian grounds as opposed to legal grounds. It is quite clear that the sentence could not be changed upon legal grounds. As such, the argument that justifies the presence of the Attorney-General on the Pardons Board being a member biased in favour of the retention of the sentence, and so being able to give reasons against any pardon or commutation or the like, is not a very good reason.

A better way of justifying his presence on the Board would be to assume that he is sitting there in a different capacity, considering humanitarian reasons rather than legal ones. In truth, it is not easy for an official who has successfully prosecuted an accused and thereby a conviction was obtained, to then consider to reduce the sentence passed, based even on humanitarian grounds.

The presence of the Attorney-General as a member of the Board will still, more often than not (and perhaps, at all times) be a disadvantage to the petitioner. At present, all the other members may be viewed as neutral parties. Maybe one of them should be a person who is "biased" in favour of the petitioner. This could at least neutralize the bias of the Attorney-General. One such person would be the Director-General of Prisons. However, to date, a Director-General of Prisons or any other high-ranking officials of the prisons has never

been appointed even as a temporary member, of the Pardons Board. Of course, the Director-General may not be biased in favour of petitioners all the time - a petitioner may have behaved in such a way whilst serving sentence in prison that the prison authorities do not support his petition for pardon. In these circumstances, there would be only one "biased" party - the Attorney-General. The writer feels that it is not important that his "bias" be highlighted. If a petitioner does not "deserve" his sentence to be reduced, whether the people sitting to hear his petition are biased or not would be irrelevant. In any event, it is only one out of five members.

(d) Types of sentences that go before the Pardons Board

In theory, a person who is convicted of any offence may petition the Yang di Pertuan Agong or Ruler for a pardon. This is clearly stated in Clauses (1) and (2) of Article 42. In practice however, it would be impractical and ludicrous if a road traffic offender in the Federal Territory of Kuala Lumpur were to petition the Yang di Pertuan Agong for a pardon!

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37. See Chapter VI.

38. Dangerous Drugs Act 1932 (Act 234), s. 39B.

39. Internal Security Act 1960 (Act 82), s. 37(1).

In practice however, it is the more serious crimes - those that entail more serious punishments, that appeal to the Pardons Board. Maybe the law on this aspect, that is a person convicted of any offence may make a petition for pardon, ought to be reviewed. The scope of pardonable offences should be a lot narrower than what exists today. Pardons should be extended only if there are very strong and clear reasons for it coupled with the fact that if a pardon is not granted, "injustice" would be done. This would of course relate to the sentence that is meted out. The sentence should be serious, such as death, imprisonment for natural life or life imprisonment, before a petition for pardon can be made.<sup>39</sup> Statistics show that those who appeal come largely from these three types of punishments; death sentences, life imprisonment and imprisonment for natural life.

(d)(i) Death Sentence

Offences that impose death sentences in Malaysia are:

- trafficking in dangerous drugs,<sup>40</sup>
- unauthorised possession of firearms, ammunitions and explosives,<sup>41</sup>

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<sup>39</sup>. See Chapter VI

<sup>40</sup>. Dangerous Drugs Act 1952 (Act 234), s. 39B.

<sup>41</sup>. Internal Security Act 1960 (Act 82), s. 57(1).



- discharging a firearm in the commission of a scheduled offence,<sup>42</sup>
- being an accomplice in the above,<sup>43</sup>
- murder,<sup>44</sup>
- offences against the person of the Yang di Pertuan Agong or a Ruler or a Governor,<sup>45</sup> and
- abetment of the above.<sup>46</sup>

These offences all entail mandatory death sentence, although so far no one has been tried for the two offences last mentioned.

The offences below are punishable with death as the maximum punishment, the alternative being life imprisonment:

- abduction, wrongful restraint or wrongful confinement for ransom,<sup>47</sup>
- waging or attempting to wage war, or abetting the waging of war, against the Yang di Pertuan Agong or the Ruler or Governor of a State,<sup>48</sup>

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42. Firearms (Increased Penalties) Act, 1971 (Act 37), s.3.

43. Ibid, s. 3A.

44. Penal Code, s. 302.

45. Ibid, s. 121A.

46. Ibid, s. 121A.

47. Kidnapping Act 1961 (No. 41 of 1961), s. 3(1).

48. Penal Code, s. 121.

- (4)(1) - abetment of mutiny, if mutiny is committed in consequence thereof,<sup>49</sup>
- giving or fabricating false evidence, intending and thereby causing an innocent person to be convicted and executed,<sup>50</sup>
- abetment of suicide committed by a child, or insane or delirious person, or any idiot, or a person intoxicated,<sup>51</sup>
- attempt to murder by a life convict, if hurt is caused,<sup>52</sup>
- kidnapping or abducting in order to murder,<sup>53</sup>
- gang robbery with murder,<sup>54</sup>
- trafficking in firearms<sup>55</sup>
- consorting with person carrying or having possession of arms or explosives,<sup>56</sup>
- receiving, having in possession or providing supplies of firearms, ammunition or explosives,<sup>57</sup> and
- manufacturing an arm or ammunition without a valid licence or in contravention of any condition imposed under Section 12(2)(a).<sup>58</sup>

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49. Ibid, s. 132.

50. Ibid, s. 194.

51. Ibid, s. 305.

52. Ibid, s. 307.

53. Ibid, s. 364.

54. Ibid, s. 396.

55. Firearms (Increased Penalties) Act, 1971 (Act 37), s. 7(1).

56. Internal Security Act 1960 (Act 82), s. 58(1).

57. Ibid, s. 59.

58. Arms Act, 1960 (Act 206), s. 14(1).

(d)(ii) Life Imprisonment

The second category of type of punishments that appeal to the Pardons Board is life imprisonment. It is provided<sup>59</sup> that:

Where any person is treated as having been sentenced or is hereafter sentenced to imprisonment for life, such sentence shall be deemed for all purposes to be a sentence of imprisonment for twenty years.

Offences that entail life imprisonment as the maximum punishment are:

- offences which involve hereoin, morphine, prepared opium or raw opium as its subject matter.<sup>60</sup>

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59. Criminal Justice Act, 1953 (Act 345), s. 3. Hereafter, 'life imprisonment' means imprisonment for twenty years in accordance with this provision unless otherwise stated.

60. Dangerous Drugs Act, 1952, (Act 234), s. 39A.

61. 1952 (Act 234).

62. 1960 (Act 82).

63. 1961 (No. 41 of 1961).

64. 1953 (Act 345).

65. Chapter VI i.e. Of Offences Against The State, include ss. 121-130A.

66. Penal Code (Amendment and Extension Act, 1976) (Act 377). Schedule Part II, s. 3(2).

At this juncture, the writer would like to raise the different meanings of the phrase 'life imprisonment'. Life imprisonment under the Dangerous Drugs Act,<sup>61</sup> Internal Security Act,<sup>62</sup> and Kidnapping Act,<sup>63</sup> means imprisonment for twenty years in accordance with the provision in section 3 of the Criminal Justice Act.<sup>64</sup>

Under the Penal Code, s. 130A provides:

"In this Chapter:<sup>65</sup>

- (b) 'imprisonment for life' means (subject to the provisions of any written law conferring power to grant pardons, reprieves or respites or suspension or remission of punishments) imprisonment until the death of the person on whom the sentence is imposed."

Apart from Chapter VI, those offences which were punishable with 'life imprisonment' before have now been amended to 'imprisonment which may extend to twenty years.'<sup>66</sup>

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61. 1952 (Act 234).

62. 1960 (Act 82).

63. 1961 (No. 41 of 1961).

64. 1953 (Act 345).

65. Chapter VI i.e. Of Offences Against The State, include ss. 121-130A.

66. Penal Code (Amendment and Extension Act, 1976) (Act 327). Schedule Part II, s. 3(2).



more common ones are:

- It is felt appropriate that sentences of  
 ent and imprisonment which may extend to t  
 classified under the same heading since in  
 having a firearm at the time of  
 committing or attempting to commit or  
 obtaining the commission of a scheduled

having a firearm at the time of  
committing or attempting to commit or  
obstructing the commission of a scheduled

types of punishments imprisonment for twenty years is the common factor.

(d)(iii) Imprisonment for Natural Life

In order to avoid confusion as to the meaning of 'life imprisonment', imprisonment until the death of the person would be referred to as imprisonment for natural life.

The offences that entail mandatory imprisonment for natural life are:

- offences against the authority of the Yang di Pertuan Agong, Ruler or Yang di Pertua Negeri,<sup>73</sup>
- exhibiting a firearm in a manner likely to put any person in fear of death or hurt, at the time of committing or attempting to commit or abetting the commission of a scheduled offence or robbery,<sup>74</sup> and
- having a firearm at the time of committing or attempting to commit or abetting the commission of a scheduled offence.<sup>75</sup>

73. Ibid, s. 121B. This section is part of Chapter VI and therefore subject to the interpretation given in s. 130A(b) as laid down above.

74. Firearms (Increased Penalties) Act, 1971 (Act 37), s.4. S. 2(1) states that:

"imprisonment for life" means, notwithstanding section 3 of the Criminal Justice Act 1953, and any other written law to the contrary, imprisonment for the duration of the natural life of the person sentenced.

75. Ibid, s. 5.

As for imprisonment for natural life being the maximum punishment, the offences are:

- collecting arms or ammunition with the intention of waging war against the Yang di Pertuan Agong, a Ruler or Yang Di Pertua Negeri,<sup>76</sup>

- waging war against any power in alliance with the Yang Di Pertuan Agong,<sup>77</sup>

- harbouring or attempting to harbour any person in Malaysia or person residing in a foreign State at war or in hostility against the Yang Di Pertuan Agong,<sup>78</sup>

- public servant voluntarily allowing prisoner of State of War in his custody to escape,<sup>79</sup>

- aiding the escape of, rescuing or harbouring such prisoner,<sup>80</sup> and

- where a person makes or attempts to make use of an arm or imitation arm with intent to resist or prevent the lawful apprehension or detention of himself or any other person.<sup>81</sup>

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76. Penal Code, s. 122.

77. Ibid, s. 125.

78. Ibid, s. 125A.

79. Ibid, s. 128.

80. Ibid, s. 130.

81. Arms Act, 1960 (Act 206), s. 32(a)(a).  
S. 2(1) provides:

82. "imprisonment for life" means, notwithstanding section 3 of the Criminal Justice Act, 1953, and any other written law to the contrary, imprisonment for the duration of the natural life of the person sentenced.

(a)(1) All of the above-mentioned are the types of sentences that <sup>are the subject of</sup> usually appeal to the Pardons Board. Where sentences of death are concerned, appeals to the Pardons Board would be as against the decision of either the High Court or the Supreme Court.<sup>82</sup> Where the sentence is one for life imprisonment or imprisonment for natural life, the appeals could be made either as against the decision of a court or as against the decision of the Pardons Board itself. The latter situation would arise when a death sentence is commuted.

## B. INSTITUTION OF PROCEEDINGS

### (a) Appeals to the Pardons Board

An appeal to the Pardons Board may be made in one of three ways. Appeals may be made through a lawyer, through the Prison Rules, 1953 or from a decision of a court-martial. In all the three ways, the nature of the appeal always remains the same. The only difference, albeit minor, lies upon the authority who is advising the prisoner.

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82. For further details, see Mimi Kamariah Majid, *Criminal Procedure in Malaysia*, 1987, pg. 294-8.

83. The Prison Rules, 1953, Rule 131(1).



(a)(i) Appeal through counsel

Appeals through counsel may be made either by the prisoner himself or by his personal representatives. In the former situation, an interview with a lawyer has revealed that all it involves is the lawyer seeing the prisoner in prison - at the request of the prisoner - and help the prisoner draft a letter to the Yang Di Pertuan Agong or Sultan, as the case may be. What happens after that would be beyond the powers of the counsel or the prisoner.

Alternatively, the personal representatives of the prisoner may go to see a lawyer and seek his aid to draft a letter of petition to the Yang Di Pertuan Agong or the Sultan, as the case may be.

(a)(ii) Appeal through Prisons Rules, 1953

It is provided<sup>83</sup> -

"A prisoner may, if he wishes, petition the Yang Di Pertuan Agong or Ruler or Governor, as the case may be, on the subject of his conviction or sentence on the completion of one year of his sentence, a second such petition shall

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83. The Prisons Rules, 1953, Rule 111(1).

prisoner wait for one year before a petition is made on his behalf is so that he may be allowed when a prisoner has completed three years from the date of conviction, and thereafter such petitions shall be granted at two yearly intervals, unless there are any special circumstances which the Officer-in-Charge may consider should be brought to the notice of the Yang Di Pertuan Agong or Ruler or Governor, as the case may be."

Once a prisoner is brought to the prisons, an Officer-in-Charge will open a file on the prisoner and record all particulars relating to the offence that has been committed. This particular section prescribes that the sentence imposed must be more than one year. Sentences for life imprisonment or imprisonment for natural life would be covered under this proviso. The one year sentence referred to above is after remission being granted. A remission of one-third of the sentence is automatically granted to every convicted prisoner who is sentenced to a term of imprisonment exceeding one month.<sup>84</sup> As such, for Rule 111 of the Prisons Rules, 1953 to apply to a prisoner, he originally has to be sentenced to more than eighteen months' imprisonment. The purpose of having the

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84. Ibid, Rule 43(a). Rule 43 reads: With a view to encouraging good conduct and industry and to facilitate reformatory treatment, a prisoner sentenced to imprisonment shall be entitled to be granted remission as follows:-

(a) a convicted prisoner sentenced to a term of imprisonment exceeding one month shall be granted as remission one-third of his sentence: Provided that in no case shall any remission granted result in the release of a prisoner until he has served one calendar month; ...

prisoner wait for one year before a petition is made on his behalf is so that the prison authorities have ample time to assess his conduct or behaviour and his attitude towards prison training, amongst other things, before a recommendation for his pardon or otherwise, can be made.

Once a prisoner is brought to the prisons, an Officer-in-Charge will open a file on the prisoner and record all particulars relating to the offence that has been committed, personal details of the prisoner and other relevant matters. If the prisoner is to serve a term of imprisonment of one month or less, he will not be granted remission.<sup>85</sup>

If however, his term of imprisonment exceeds one month, the Officer-in-Charge will inform the prisoner of the one-third remission of his sentence. The prisoner will also be informed of his right to appeal after completing one year of his sentence. Should the prisoner want to exercise his right of appeal, this intention will be communicated to the Officer-in-Charge when the time comes. The Officer-in-Charge will of their sentence before making an appeal to the then

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<sup>85</sup>. Ibid, Rule 43(b), which reads:

(b) a prisoner sentenced to a term of imprisonment of one month or under shall not be granted remission.

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<sup>86</sup>. See Appendix 1.

prepare a report on the behaviour and characteristics of the prisoner. A report will also be made by a medical officer regarding the health of the prisoner, with details as to whether further imprisonment would impair the health of the prisoner. Another report that will be included in the appeal would be a report from the head of department in which the prisoner has worked for during his prison training. All these reports will be sent to the Director-General of the Prisons, who will then add or enter any recommendations that he may want to make.

Finally, a letter addressed to the Yang di Pertuan Agong, or Ruler or Governor, as the case may be, will be enclosed in the appeal; signed by the prisoner.<sup>86</sup> This 'appeal letter' will be sent to the State Secretary of the State in which the prisoner committed the crime, who will then forward the letter to the Pardons Board.

An official at the Prisons Headquarters affirms that prisoners prefer to wait until they have served one year of their sentence before making an appeal to the Pardons Board. This is as opposed to appealing through a lawyer. The reason, obviously, is cost. Appealing through the Prisons Rules is free of charge.

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86. See Appendix I.



So far, the discussion has centred around the issue of the prisoner electing to exercise his right to appeal. Under the Prisons Rules, there is a provision<sup>87</sup> whereby, even if the prisoners do not wish to appeal, an appeal will nevertheless be made on their behalf. This "automatic appeal" only applies to prisoners who have completed at least four years and thereafter, eight, twelve, sixteen or twenty years of their sentences. The "automatic" appeal also applies to a prisoner who has served seven or more years of his sentence and has attained the age of sixty years. The Officer-in-Charge is required to prepare a report on every such prisoner. A report under this Rule is referred to as the quadrennial reports. The function of a quadrennial report is to appeal for a reduction in sentence.

The report by the Officer-in-Charge include -

- (a) a statement by the Officer-in-Charge on the work and conduct of the prisoner; and
- (b) a statement by the Medical Officer on the mental and bodily condition of the prisoner, with particular reference to the effect of imprisonment on his health.<sup>88</sup>

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87. Prison Rules, 1953, Rule 55(1).

88. Ibid, Rule 55(2).

89. Ibid, Rule 55(4).

90. See Appendix II.

The Officer-in-Charge shall forward every such report to the Commissioner who shall enter thereon any recommendations he may desire to make and forward it to the Chief Minister of the State within which the offence was committed or treated to have been committed for the purpose of Article 42 of the Constitution, except that in the case of a person convicted of an offence by a Military Court constituted under the Military Courts Proclamation, such reports shall be forwarded to the Minister.<sup>89</sup>

The Yang di Pertuan Agong or the Ruler or Governor, as the case may be, may, acting in accordance with the provision of Article 42 of the Constitution, remit the residue of the prisoner's sentence or may direct at what later time or times the case shall be re-submitted for his consideration and in that event he may at any later date either remit part thereof or the residue of the prisoner's sentence.<sup>90</sup>

In order to carry out the requirements stated in Rule 55 of the Prisoners Rules, 1953, the Prisons Authorities provide quadrennial reports booklets.<sup>91</sup> In a booklet, one will find -

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89. Ibid, Rule 55(3).

90. Ibid, Rule 55(4).

91. See Appendix II.

- (i) precis of offence from the police,<sup>11</sup>
- (ii) personal details of the prisoner,
- (iii) record of past offences,
- (iv) report of his conduct by his prison supervisor,
- (v) report of the Director of Prisons,
- (vi) report of the medical officer and
- (vii) certification by the Director-General of Prisons.

This booklet, as in the appeal mentioned above, will be sent to the relevant State Secretary to be forwarded to the Pardons Board.

If a prisoner is under a sentence of death, obviously the one-year bar does not apply. Such prisoner may petition the Yang di Pertuan Agong or the Ruler or Governor, as the case may be, as soon as the sentence is passed.<sup>93</sup> In this situation the prison authorities will only help the prisoner to draft the letter of petition to the relevant authority.<sup>94</sup> Some selected details of the

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92. It has been suggested that this precis may be biased as it is prepared by the police, who is the prosecutor. It is felt, however, that the issue should not be taken out of proportion. Since the police arrested the prisoner, therefore reliance has to be made on their story.

93. Prisons Rules, 1953, Rule 112.

94. See Appendix III.

prisoner, taken from his original record, will be attached to the letter of appeal. No recommendations or reports from the prison authorities will accompany this letter of appeal.

(a)(iii) Appeal from a decision of a court-martial

Once the court-martial imposes the death sentence or life imprisonment, the accused may petition the Yang di Pertuan Agong for a pardon. The situation is similar to that of a prisoner sentenced by the ordinary courts, appealing through a lawyer.

Once the offender is sent to prisons, he will be subject to the Prisons Rules, 1953. Military law, that is the Armed Forces Act 1972 ceases to apply. As such, if he is under a sentence of death, he may make an appeal immediately,<sup>95</sup> otherwise he is also subject to the one-year bar.<sup>96</sup>

(b) Covening a Pardons Board; nature of proceedings

Once a person is sentenced to death, even if he refuses to exercise his right to appeal under rule 112 of the Prisons Rules, 1953, his sentence of death would nevertheless be considered by the relevant Pardons Board. Section 281 of

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95. Prison Rules, 1953, Rule 112.3. Cap. 6), s 281(b)(1).

96. Ibid, Rule III.(2).



the Criminal Procedure Code<sup>97</sup> lays down the procedures to be followed with regard to sentences of death. State, but before

file will In cases in which a notice of appeal is not given within the prescribed period, the Judge passing sentence of death shall, as soon as convenient; after such period has elapsed, forward to the Mentri Besar of the State in which the crime was committed, a copy of the notes of evidence taken at the trial, together with a report in writing signed by him, setting out his opinion whether there are any reasons, and, if any, what reasons there are, why the sentence of death should or should not be carried out.<sup>98</sup>

In cases in which notice of appeal is given the Judge who passed the sentence of death shall, as soon as convenient, forward to the Supreme Court the report in writing referred to in the previous paragraph. If the Supreme Court dismisses the appeal, the Judge presiding in such Court shall as soon as convenient after such dismissal forward to the Mentri Besar the said report in writing together with a copy of the notes of evidence taken at the original trial, a copy of the record of the proceedings before the Supreme Court and also such report, if any, on the case as the Supreme Court may think fit to make and signed by the Judge presiding in the Supreme Court.<sup>99</sup>

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98. Criminal Procedure Code (F.M.S. Cap. 6), s 281(b)(1).

99. Ibid, s. 281(b)(2).

Upon receipt of the proceedings, the Mentri Besar shall submit the same to the Ruler of the State. But before that, when the documents are received by the Mentri Besar, a file will be opened and the matter will be referred to the State Legal Adviser, who will further refer the matter to the Attorney-General. The Attorney-General will then submit his written opinion of the case. Once this is done, a member of the Pardons Board will request the Ruler for an audience. Once the date and place have been fixed, the necessary preparation of the working papers to be presented will be made. Finally members of the Pardons Board will be notified and invited to the meeting. The Ruler, acting in accordance with the provisions of Article 42 of the Constitution, may pardon the offender or commute his sentence or exercise the other options available to him. Any decision of the Ruler will be communicated to the Judge who passed the sentence. If the sentence is to be carried out, the place of execution will be stated.<sup>1</sup>

The Ruler of the State, acting in accordance with the provisions of Article 42 of the Constitution may order a respite of the execution of the warrant and afterwards appoint some other time or other place for its execution.<sup>2</sup>

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1. Ibid, s. 281(c).

2. Ibid, s. 281(d)(2).

The procedure as laid down above applies when a death sentence is passed, whether or not an appeal is made to the Pardons Board.

An appeal under rule 111 of the Prisons Rules, 1953, may be made by the prisoner himself or his closest relatives such as his parents, children or wife (husband).<sup>3</sup> When an appeal is received in this way, all details of the prisoner will be gathered. The prison authorities will also be asked to submit their opinion on the prisoner. The Attorney-General will also be asked to submit his written opinion. All these documents will be presented to the meeting for the consideration of the Pardons Board.

The Pardons Board will only meet if and when there are cases for consideration of the board. It does not function on a scheduled basis. The Board will only sit when all members are present - which normally is six, including the Yang di Pertuan Agong or Ruler or Governor. The Yang di Pertuan Agong or Ruler or Governor himself has to preside and chair the meeting in accordance with the provision in Clause (8) of Article 42 of the the Constitution.

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3. See Appendix IV : Perak.

The Attorney-General may delegate his functions as a member of the Board to any other person.<sup>4</sup> Normally either the Solicitor-General or the State Legal Adviser of the relevant State will be appointed in place of the Attorney-General. This 'delegate' is normally appointed for that one meeting. However, the practice has been for the person delegated with the functions of the Attorney-General to attend the subsequent meeting which considers the unfinished business of the previous meeting, if any. There are no criteria that must be satisfied by the 'delegated member' but the Attorney-General is of the opinion that the person should be legally trained.<sup>5</sup>

During the meeting, the Pardons Board will consider all matters relevant to the case. It will consider the written opinion of the Attorney-General before tendering advice to the Yang di Pertuan Agong or Ruler or Governor. The advice of the Attorney-General is not binding on the Board but it is true to say that more often than not his advice is adhered to. But the rule remains that a Pardons Board is free to make its decisions without being bound by any views or precedent.

Under the provisions of the Ruler of the State in which the trial is held.<sup>7</sup>

4. Article 42(5) of the Constitution.

5. See Appendix IV : Attorney-General.

6. This would only be in theory, as discussed previously.

7. Section 34(1).



When members of a Pardons Board have reached a decision this will be communicated to the Yang di Pertuan Agong, or Ruler or Governor, as the case may be, who will act in accordance with the advice. Any decision as to the details of commutation, remission and so forth shall be decided by the Yang di Pertuan Agong or Ruler or Governor.<sup>6</sup> As far as commutation is concerned, normally a particular sentence will be commuted to the next less serious sentence. For instance, a death sentence commuted to imprisonment for natural life, a sentence of imprisonment for natural life commuted to life imprisonment and so forth. When the evidence shows that a person is mentally disturbed or insane during the commission of the offence, the Yang di Pertuan Agong or Ruler or Governor may commute his sentence and detain him for an indeterminate period. The Criminal Procedure Code provides that whenever there is a finding that the accused committed the act alleged, and the act would have constituted an offence but for the incapacity found, the Court before which the trial has been held shall order such person to be kept in safe custody in such place and manner as the Court thinks fit. The Court shall also report the case for the orders of the Ruler of the State in which the trial is held.<sup>7</sup>

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6. This would only be in theory, as discussed previously.

7. Section 348(1). *Criminal Procedure Code (F.M.S. Cap. 8) section 348.*

For a more lengthy discussion on this issue, see Chapter VI.

It is further provided that when any person is confined under the provisions of section 348 in a mental hospital and any two of the visitors and Medical Superintendent jointly certify that in their judgment such person may be safely discharged without danger of his doing injury to himself or any other person, the Ruler may order for such person to be discharged from such mental hospital.<sup>8</sup>

There is no clear way of knowing how long a Pardons Board may take to reach a decision as this would depend on the case in question, but normally a decision would be reached at the end of each session.<sup>9</sup> Finally, the applicant and the prison authorities will be notified of the decision.

### C. TYPES AND EFFECTS OF PARDON

#### (a) Types of pardons

There are two types of pardon in Malaysia, namely the full pardon and the conditional pardon.

##### (i) A full pardon

The grounds for granting a full pardon cannot be ascertained as the exercise of the power of pardon is discretionary. In England a full pardon may be given to a

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8. Criminal Procedure Code (F.M.S. Cap. 6) section 350.

9. For a more lengthy discussion on this issue, see Chapter VI.

man who was wrongly convicted of a crime. An example of this type of pardon is the case of Maurice Swanson who was pardoned and freed in 1975 after serving eleven months of imprisonment for a robbery he did not commit when another man confessed to the crime.<sup>10</sup>

In Malaysia full pardons are rare. In fact the only instance whereby a full pardon was granted was in 1987 to the former Chief Minister of Selangor, Datuk Harun Idris, who was charged and duly convicted for corruption. The Yang di Pertuan Agong granted him a full pardon upon recommendation by the Federal Territory Pardons Board.<sup>11</sup>

(ii) A conditional pardon

In this country, remissions or conditional pardons are the norm, usually given to persons convicted and sentenced to death. An appeal may be made to the Ruler, who will convene the appropriate Pardons Board to decide whether the death sentence should be commuted to life imprisonment. It is for this reason that a remission is sometimes known as a conditional pardon. In such a situation the convicted person is not forgiven for his crime but his life is spared on condition that he agrees to life imprisonment.

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10. Berita Times, 1.6.1981.

11. New Straits Times, 31.8.1987.

It is felt that the term "conditional pardon" should not be used interchangeably with the term 'remission.' A remission is widely understood as a reduction in the amount of a particular punishment, without the character of the original sentence being changed. Whereas a conditional pardon, in cases of sentences of death, means that the prisoner will not be hanged provided he is willing to serve a sentence of life imprisonment. It is obvious that the two are totally different in character. If conditional pardon is to be used interchangeably with another term, the more appropriate one would be commutation, as the idea underlying a conditional pardon is the substitution of one form of punishment for another.

#### (b) Effects of pardon

Examples of conditional pardons are in August 1968 where thirteen men were condemned to death for consorting with Indonesians and for carrying arms during the Indonesian confrontation. Eleven were granted conditional pardons by the Sultan of Johore and two by the Sultan of Perak.

12. PD(A) 162/73.

13. See above, p. 27.



In yet another case, a conditional pardon was given to a fourteen year old boy who was sentenced to death in 1977 under the Internal Security Act on two charges of unlawful possession of a firearm and some ammunition. The death sentence was commuted to detention at the pleasure of the Yang di Pertuan Agong until he reached the age of twenty-one years. This case made legal history because it was the first case of a fourteen year old being sentenced to death. The High Court judge trying the case had no alternative but to impose the death sentence because the boy was tried under the Essential (Security Cases) (Amendment) Regulations, 1975<sup>12</sup> which carried a mandatory death penalty.<sup>13</sup>

**(b) Effects of pardon**

The effects of a royal pardon would depend on how it has been worded.

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12. PU(A) 362/75.

13. See above, n. 27.

D. On the one hand, a pardon may be worded such that it means a 'clean slate.' On the other hand, the words could mean that the prisoner is merely released from jail and does not have to serve his sentence, but the conviction remains in the books.

The effect of a full pardon is that the conviction against the person is written off. The offender gets a 'clean slate' and he can stand for offices or take part in elections. It cleanses a person from

"all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon the conviction."<sup>14</sup>

A conditional pardon does not have the effect of absolving guilt. The conviction and stigma of having been convicted will remain.

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14. Extract from report in Berita Times, 1.6.1981.  
2 MLJ 385 and Superintendent of Prisons & Ors v Ee Kio Choo [1986] 1 MLJ 494.

15. Act 18 of 1950.

#### D. JUDICIAL REVIEW OF THE POWER OF PARDON

The issue that will be examined below is whether the exercise of mercy may be subject to judicial review.

This issue, as well as the nature and scope of the power of pardon was raised in a case that resulted in two Supreme Court decisions.<sup>15</sup> Sim Kie Chon was tried and convicted for possession of firearms and ammunition without lawful authority under section 57 of the Internal Security Act,<sup>16</sup> and was sentenced to death by the High Court at Kuala Lumpur. His appeal to the Federal Court was dismissed and his sentence of death was confirmed. This case was then considered by the Pardons Board for Security Offences, which affirmed the death sentence. The Yang di Pertuan Agong held that in his judgment it was expedient to carry out the death sentence and ordered his execution at the Pudu Prison in Kuala Lumpur. The High Court consequently issued a warrant of execution. Sim Kie Chon then instituted proceedings challenging the denial of the Pardons Board of his application for pardon.

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15. Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 and Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494.

16. Act 18 of 1960.

17. Dato Mohd Sar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232.

18. [1985] 2 MLJ 268.

He alleged that the Board had not properly considered his application for mercy by not commuting his sentence of death and had acted in contravention of Article 8 of the Constitution which ensured equality before the law and equal protection of the law. The basis of his claim of unequal treatment was based on the earlier decision of the Board which commuted the death sentence of Dato Mokhtar bin Hashim, a former government minister who had been convicted of murder.<sup>17</sup> He contended that by rejecting his case the Pardons Board had failed to exercise impartiality and uniformity in its decision. *Federal Constitution read with regulation 19 of the Internal Security* With regard to the arguments relating to equality it was held that the cases of Dato Mokhtar bin Hashim and the appellant were not similar because the former was convicted under section 302 of the Penal Code and the latter under the Internal Security Act. Moreover the Pardons Board which heard the two applications for pardon were different. The court further said that even if two persons were convicted for the same offence under the same Act and both were sentenced to death, the sentence of one being commuted to life imprisonment and the other not commuted is no ground to say that there is inequality before the law because the facts of each case can never be the same.<sup>18</sup>

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17. Dato Mokhtar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232.

18. [1985] 2 MCLJ 268.



The Supreme Court ruled that the function of the Pardons Board is merely to tender advice and not to commute a death sentence. The implication that arises is that the Board did not make the decision to pardon and therefore its alleged partiality was not relevant.

The Court further observed that although the Pardons Board tendered advice to the Yang di Pertuan Agong<sup>p</sup> it was the Yang di Pertuan Agong himself who exercised the power in accordance with Article 42(1) of the Federal Constitution read with regulation 29 of the Essential (Security Cases) Amendment Regulations, 1975. Such power belongs to the area of high prerogative of mercy which although an executive act, by its very nature is not one susceptible or amenable to judicial review.

A decision made pursuant to an exercise of royal prerogative of mercy cannot be varied or confirmed by the courts, there being no jurisdiction to do so. Proceedings in court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable.<sup>19</sup>

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19. [1985] 2 MLJ 386.

Shortly after the Court rendered this decision, Sim filed another action seeking to prevent his execution. He alleged this time, that the Board acted unfairly and in breach of both the rules of natural justice and Articles 42, 5(1) and 8(1) of the Constitution. The Court stated that the scope of the duty to act fairly imposed by the rules of natural justice depends upon the subject-matter and circumstances of each case and that neither the Federal Constitution nor the Criminal Procedure Code contained requirements requiring the Pardons Board to act in accordance with the rules of natural justice.

Again the Court reiterated the position that the Pardons Board is only an advisory body and makes no decision as such but only tenders advice to His Majesty for the purpose of the exercise of his powers of clemency under Article 42 of the Constitution.

"The primary powers of clemency are ... vested solely in His Majesty under the substantive clauses (1) and (2) of Article 42 of the Constitution (read in the light of the Regulations) empowering him to make the decision in the circumstances of any particular case and the mode of the exercise of those powers and the reference to the advice and constitution of a Pardons Board specified

in clauses (4) et sequitur of Article 42 in fact provide the machinery for the functional implementation thereof."<sup>20</sup>

The House of Lords in England in a landmark decision in the case of Council of Civil Service Unions & Ors v Minister for the Civil Service<sup>21</sup> said that judicial review of the exercise of the prerogative was possible. This was repeated in the judgment of Tan Sri Dato Abdooldader SCJ in Sim's case<sup>22</sup> where he said:

"In relation to the question of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would be dependent on its nature or subject matter ... exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say, if it is a matter upon which the court can adjudicate."

He continued and stated that some prerogative powers are immune from judicial review, one of which is the prerogative of mercy,

"... because their nature and subject matter are such as not to be amenable to the judicial process."<sup>23</sup>

20. [1986] 1 MLJ 496-497.

21. [1985] 1 AC 374.

22. At pg 497.

23. Ibid.

Another earlier instance whereby this position was taken was in Public Prosecutor v Lim Hiang Seah<sup>24</sup> where the court stated that it had no jurisdiction to confirm or vary the executive decision of the Yang di Pertuan Agong to commute a sentence.

In yet another case<sup>25</sup> which concerned an application for a stay of execution, the court held that it had no jurisdiction to deal with the sort of application made for the reason that mercy is not the subject of legal rights. Any stay of execution would only be an extension of the prerogative of the Yang di Pertuan Agong in accordance with Article 42 of the Federal Constitution.

It must be emphasised though that other questions such as the proper composition of the Pardons Board may be raised in the courts, as was done so in Sim's case. Since the grant of mercy is based on Article 42 of the Constitution, it has been suggested<sup>26</sup> that if for instance

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24. [1979] 2 MLJ 170.

25. Chiew Thiam Guan v Superintendent of Pudu Prison [1983] 2 MLJ 116.

26. Shad S Faruqi, Exercise of Prerogative Powers - Is Judicial Review Possible? *Shariah Law Journal* 1986, 57.



the Pardons Board met without the presence of a Ruler or did not consider the written opinion submitted by the Attorney-General, the court may vitiate the proceedings.

To summarise, it is the grounds on which a decision is based or rather the decision itself that cannot be examined by the courts because the exercise of the power to grant or refuse a pardon is a highly discretionary power of a non-justiciable type. The 'duty to act fairly' which otherwise applies to administrative decisions also does not apply to the process of granting pardons for the same reasons.<sup>27</sup>

But the courts may look into the appropriateness of the procedures, as laid down in Article 42 such as, ensuring that there are five members or that none of the members is a member of the Legislative Assembly of a State or of the House of Representatives.

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27. For a more thorough discussion of the issue, see

- (i) Assoc Prof LR Penna, Pardoning Power And The "Saga" of Sim Kie Chon, Singapore Law Review, Vol 8 1987, 106.
- (ii) Peter Crook, Sim Kie Chon v Superintendent of Pudu Prison & Ors - The Royal Prerogative of Mercy", 1986 JMCL, 195.

## **E. THE ISLAMIC PERSPECTIVE**

### **(a) Article 42(10) of the Federal Constitution**

Pursuant to clause (10) of Article 42 of the Constitution, the Yang di Pertuan Agong, as Head of the religion of Islam in the States of Malacca, Penang, Sabah or Sarawak or the Federal Territories of Kuala Lumpur and Labuan may grant pardons, reprieves and respites in respect of, or to remit, suspend or commute sentences imposed by the Syariah Courts in the States mentioned above. For the remaining states in Malaysia, the Sultan or Yang di Pertuan Besar, as the case may be, as head of the religion of Islam shall exercise the power of pardon.

### **(b) Categories of crimes in Islam**

The granting of pardon in Islam depends on the type of offence that has been committed. Crimes fall under three categories in accordance with the degree of seriousness or the mildness of punishment.

1. Hudud,
2. Qisas and Diyat and
3. Ta'zir.

(b)(i) Hudud crimes

Crimes involving hud are clearly determined. They are. The main purpose of punishment in Islam is not retribution but specific and general deterrence. The more effective the penalty is in fulfilling that purpose, the more successful it becomes in combating serious crime. This is the rationale for enforcing severe penalties for the more dangerous crimes, so that the severity of the penalty will prevent the recurrence of similar conduct.

(iii) 'Hudud' stems from the word 'hud', which means 'to prevent' or 'to deter'. A hud may be defined as the punishment prescribed as the right of Allah. In this definition, prescribed punishment means that both the quantity and quality thereof is determined. What is meant by its being prescribed as the right of Allah is that the individuals and the community cannot annul it. A wrongful act is said to be against the right of Allah when it infringes the interest of the society at large - for instance, doing an act that disrupts the peacefulness of the society. Any act that does harm to the people and the punishment thereof correspondingly benefits them, its punishment must necessarily be treated as the right of Allah. Such punishment cannot be invalidated by the individual or the society.

Crimes involving hud are clearly determined.

They are seven in number, namely:

- (i) Adultery (zina)
- (ii) False allegation of adultery
- (iii) Drinking of alcohol
- (iv) Theft
- (v) Highway robbery
- (vi) Apostasy and
- (vii) Transgression.

(ii): Hudud and pardons

There is a difference as to the right to grant a pardon depending on whether the offence has been brought to the courts.

#### Explanation:

If the offence has not been brought to the courts, then the victim of a hudud crime has the right to forgive the offender. This would apply in the case of theft, highway robbery, slander and transgression. Only the victim has the right to grant a pardon. If the victim is murdered during the commission of a highway robbery, the opportunity of the 'murderer' to be pardoned would be lost. A next-of-kin cannot grant pardons in hudud crimes.



When the offence is brought to the courts, no pardon is admissible. The aggrieved party or the head of the State or the person in authority has no jurisdiction to grant a pardon.<sup>28</sup> If a pardon is granted, it will be ineffective. Implementation of the above-mentioned punishments is obligatory on the State.

Amr-bin-Shu'ib from his father from his grandfather reported that the messenger of Allah (PBUH) said:

Pardon one another the ordained crimes that are among you. What reaches me about an ordained crime, becomes enforceable.

Explanation:

This means that pardon should be extended by compromise without knowledge of judges and magistrates. But when any crime is brought to their notice, it becomes unlawful to pardon the guilty and the criminals.<sup>29</sup>

28. The word 'pardon' here is used loosely, in the sense that the punishment is fixed and cannot be altered.

29. MISHKAT-UL-MASABIH. AL-Haj Maulana Fazlul Karim. Book II, Third Edition 1970, I.M. Trust, Dacca, pg 543.

30. Ibid, pg. 555.

31. H. Ghafur Raza, 'Qisas' in H. Ghafur Raza (ed.), The Islamic Criminal Justice System, Oceana, pg 201-9.

In another incident:

And he (Jabir) narrated in 'Sharhi Sunnat' that Safwan bin Umayyah came to Medina and slept in the mosque using his sheet as pillow. Then a thief came and stole his sheet. Safwan overtook him and came with him to the Messenger of Allah (PBUH). He passed order for cutting off his hand. Safwan said: I did not wish it. I give it to him as charity. Then the Messenger of Allah said: Why did you (not tell him) before you came with him?<sup>30</sup>

#### Explanation

This incident affirms the rule that once a hudud crime is brought to the notice of the authorities, and in this instance, the Prophet Muhammad himself (PBUH), the act of crime cannot be pardoned anymore.

#### (iii) Qisas and Diyat crimes<sup>31</sup>

The word Qisas means 'equality' or 'equivalence'. A person who has committed a given violation will be punished in the same way and by the same means that he used in harming another person.

30. Ibid, pg. 556.

31. M. Cherif Bassiouni, 'Qisas Crimes', in M. Cherif Bassiouni (ed.), The Islamic Criminal Justice System, Oceana, pg 203-9.

There are five Qisas crimes:

1. Murder
2. Voluntary killing (similar to intentional killing or voluntary manslaughter).
3. Involuntary killing.
4. Intentional physical injury or maiming.
5. Unintentional physical injury or maiming.

Crimes of Qisas fall into two categories, homicide and battery. Both intentional and unintentional homicide are included but the sanctions are different. The term killing includes unjustifiable and inexcusable homicides and for which there is either an element of intention or recklessness.

The categories of battery include the infliction of intentional and unintentional bodily harm which result in serious or permanent injury to the person. It also includes maiming and other forms of physical disfigurement.

The sanctions prescribed for Qisas crimes are either the Qisas, that is, the equivalent infliction of physical or bodily harm against the person who committed the act, or alternatively the payment of Diyat as compensation.

(iv) Qisas and Diyat and pardons

It is stated in the Qur'an:

We ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal. But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. (Surat Al-Maaidah : 45).

The principles of Diyat are laid down such:

Never should a Believer kill a Believer but if it so happens by mistake, compensation is due. If one so kills a Believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. (Surat Al-Nisaa : 92).

There are provisions in the Qur'an concerning other penalties for the crimes of Qisas. As between Qisas and Diyat the Qur'an clearly indicates a preference for Diyat and for forgiveness, which negates the application of Qisas.

Hold to forgiveness, command what is right, but turn away from the ignorant. (Surat Al-Araaf : 199)

and



It is part of the mercy of God that thou dost deal gently with them for if thou had been severe or harsh- heated, they would have broken away from about thee. So pardon them and ask for God's forgiveness for them and consult them in affairs of the moment. Then, when thou has taken a decision, put thy trust in God. For God loves those who put their trust in Him. (Surat Ali-Imran: 159).

In Qisas crimes, pardon or forgiveness is allowed. Pardon may be given by the aggrieved person or his heir. This pardon may be extended to Diyat as well. If the aggrieved party or his heir decides to forgo Diyat, the offender will go unpunished. Otherwise, the offender has to pay compensation to the victim.

The head of the State has no powers to condone crimes involving Qisas. It is only the person wronged or his heir who can pardon such crimes. If the person, against whom such an offence is committed has no heir or guardian, the head of State will be treated as his guardian, for according to the Syariah the sovereign is the guardian of the person who has no heir. Therefore it is only in his titulary capacity that the head of the State can pardon the offender.

(v) Ta'zir crimes

A good example of a Qisas crime was reported recently in the newspapers,<sup>32</sup> where an 18 year old boy was acquitted of a charge of causing grievous hurt to his schoolmate after he and his father publicly apologized to the victim's family in the Juvenile Court. The father of the victim forgave the offender and waived monetary compensation (Diyat) as well.

Ta'zir has several connotations. The word literal However, the head of State may impose the punishment for Ta'zir if the victim or heir of the victim fully forgives the offender - that is, to forgo both Qisas and Diyat. The punishment for Ta'zir will be imposed as a deterrent measure to future offenders.

In the example just given above, the State could for instance, send the 18 year old boy to an institution for reformative treatment or otherwise impose a small fine on the offender. In any event, the Ta'zir punishment must not exceed or be equal to either Qisas or Diyat, but at the same time possess deterrent characteristics. are subject to Ta'zir. The public authorities have a duty to lay down rules penalizing all conduct which is contrary to the public interest, public order and social tranquility.

32. New Straits Times, July 7, 1989.

33. Chawki Benmelha, 'Ta'zir Crimes,' in M. Cherif Bassiouni (ed.), The Islamic Criminal Justice System, Oceans, 22 711-725.

(v) Ta'zir crimes

The third category is that of Ta'zir which encompasses all offences for which the Syariah does not prescribe a penalty. Punishment for these crimes proceeds from the discretionary authority of the sovereign as delegated to the judge.<sup>33</sup>

Ta'zir has several connotations. The word literally means chastisement in the widest possible sense. In its legal sense, it signifies criminal punishment which is not legally fixed. Jurists consider Ta'zir as discretionary correction, rehabilitation or chastisement.

Crimes of Ta'zir are not subject to the principle of legality as in the first and second categories of crimes laid down above. Islamic law has not specified all violations subject to Ta'zir to the same extent as for other crimes. However, regardless of circumstance, all acts which infringe private or public interest are subject to Ta'zir. The public authorities have a duty to lay down rules penalizing all conduct which is contrary to the public interest, public order and social tranquility.

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33. Ghaouti Bermelha, 'Ta'zir Crimes,' in M. Cherif Bassiouni (ed.), The Islamic Criminal Justice System, Oceana, pg 211-225.

(vi) Ta'zir and pardons

The state has pardoning powers in respect of Ta'zir crimes. In these crimes the right of punishment has been delegated, by the Syariah, to the State. The state has the discretion to alter the quantum of punishment to the minimum extent of mere admonition.

The right of discretion cannot be exercised arbitrarily. The pardon of the head of State will be effective insofar as the pardon does not prejudice the right of the aggrieved person. The aggrieved party can pardon only that crime which is detrimental to his own rights. If a crime is prejudicial to the society as a whole, any pardon or remission granted by the aggrieved party will not be effective.

Any pardon granted by the head of state should promote the public good and hinder the evil. A crime cannot be excused before its commission. The pardoning of an offence before it is committed amounts to legalising the offence and this is prohibited by the Syariah.

It is inconsistent with the Syariah law whenever the sentence of a Muslim man or woman who has committed a hudud or a qisas crime is altered in any way, what more if he or she is eventually granted a pardon.



(c) Implementation of pardons according to Syariah Law in Malaysia<sup>34</sup>

To recapitulate, in theory, if the commission of a crime involving a hud is brought to the courts and is established, the judge has no choice but to pass the sentence prescribed by the Syariah.

If the crime entails qisas and the aggrieved party forgoes it or the execution of the sentence is in any way found to be inconsistent with the provisions of the Syariah, the judge is bound to order the payment of diyat, unless the aggrieved party decides to forgo this as well. In such a situation, the judge may impose ta'zir.

In Malaysia, all the Pardons Boards operate on the same principle, which is according to civil law. Under the civil law, in view of the provisions of Article 42 of the Constitution, the Yang di Pertuan Agong or the Ruler or Yang di-Pertua Negeri has the powers to grant pardons in respect of crimes, which, under Islamic Law, Heads of State would have no power to pardon. Such crimes are hudud, qisas and diyat. As such, there are inconsistencies with the Syariah law whenever the sentence of a Muslim man or woman who has committed a hudud or a qisas crime is altered in any way, what more if he or she is eventually granted a pardon.

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34. See Chapter VI.

As far as Ta'zir is concerned, the state is empowered to lay down rules and regulations. The breach of such rules will entail sanctions that are at the discretion of the head of state.

In Malaysia, the Yang di Pertuan Agong or Sultan or Yang Di Pertuan Besar, as head of the state would have the power to lay down the rules and impose punishment in Ta'zir offences. So far only the State of Kelantan has laid down such rules through the enactment of the Kelantan Syariah Criminal Code, 1985.<sup>35</sup> The offences laid down in the Code are all Ta'zir offences. The granting of pardon to these offences lie in the hands of the Sultan of Kelantan.

It is provided:<sup>36</sup>

1. When any person has been sentenced to punishment for an offence His Royal Highness the Sultan (acting in accordance with the provisions of Article XXVIIA of the Laws of the Constitution of Kelantan and Article 42 of the Federal Constitution) may at any time, without conditions, or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

<sup>35</sup>. Enactment No. 2 of 1985 (hereinafter, the Code).

<sup>36</sup>. Syariah Criminal Procedure Enactment, 1983 (No. 9 of 1983), s. 135.

2. Whenever an application is made to His Royal Highness the Sultan for the suspension or remission of a sentence His Royal Highness the Sultan may require the convicting Qadhi Besar or Qadhi to state his opinion as to whether the application should be granted or refused and such Qadhi Besar or Qadhi shall state his opinion accordingly.
3. If any condition on which a sentence has been suspended or remitted is, in the opinion of His Royal Highness the Sultan, not fulfilled, His Royal Highness the Sultan may cancel such suspension or remission, whereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer or Penyelia Ugama without warrant and remanded by a Qadhi to undergo the unexpired portion of the sentence.

His Royal Highness the Sultan (acting in accordance with the provisions of Article XXVIIA of the Laws of the Constitution of Kelantan and Article 42 of the Federal Constitution) may without the consent of the person sentenced, commute any one of the following sentence for any other mentioned after it -

- (a) imprisonment,
- (b) fine.<sup>37</sup>

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<sup>37</sup>. Ibid, s. 136.

CHAPTER IV  
STATISTICS

In all the States in Malaysia, it does not seem that pardons according to Islam is really being implemented. This is mainly because the Muslims who have committed crimes are still subject to the civil law of the land, and not Islamic criminal law.

However, as far as Ta'zir crimes are concerned, the Syariah Courts do have jurisdiction over some criminal matters. The pardoning power of these crimes lies with the Ruler of the State and this pardon would be consistent with the teachings of Islam.

This chapter will focus on statistical findings as regards the number of appeals that have been made to the various Pardons Boards in the country from 1 January 1970 to 31st July, 1984. Appeals against death sentences are submitted pursuant to convictions under section 37(I) Internal Security Act, 1960, sections 3 and 3A Firearms (Increased Penalties) Act, 1971, sections 39B Dangerous Drugs Act 1952, sections 302 and 305 of the Penal Code and section 3(1) Kidnapping Act 1961.

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1. See Chapter-III.



## CHAPTER IV

## STATISTICS

All of the above-stated sections impose mandatory death sentence, the exceptions being section 196 of the Penal Code and section 3(1) Kidnapping Act 1961. The death sentence is the ultimate punishment under these two sections.

As stated earlier,<sup>1</sup> the types of punishments that usually reach the Pardons Board for appeal are death sentences, imprisonment for natural life and life imprisonment.

(4) Section 57(1), Internal Security Act 1960

This chapter will focus on statistical findings as regards the number of appeals that have been made to the various Pardons Boards in the country from 1 January 1970 to 31st July, 1988. Appeals against death sentences are submitted pursuant to convictions under section 57(1) Internal Security Act, 1960, sections 3 and 3A Firearms (Increased Penalties) Act, 1971, sections 39B Dangerous Drugs Act 1952, sections 302 and 396 of the Penal Code and section 3(1) Kidnapping Act 1961.

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1. See Chapter III.

2. The writer could only obtain statistics with regard to the above-mentioned sections. As such, the total number of appeals made to the Pardons Board in any one period may not be conclusive. They are however to the writer's knowledge, accurate insofar as they concern the statutes above.

All of the above-stated sections impose mandatory death sentence, the exceptions being section 396 of the Penal Code and section 3(1) Kidnapping Act 1961. The death sentence is the maximum punishment under these two sections.<sup>2</sup>

**(a) Death Sentences**

**(i) Section 57(1), Internal Security Act 1960**

This section reads:

(1) Any person who without lawful excuse, the onus of proving which shall be on that person, in any security area carries or has in his possession or under his control -

(a) any firearm without lawful authority therefore; or

(b) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence and shall, on conviction, be punished with death.

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2. The writer could only obtain statistics with regard to the above-mentioned sections. As such, the total number of appeals made to the Pardons Board in any one period may not be conclusive. They are however to the writer's knowledge, accurate insofar as they concern the statutes above.

Table 3.1

**Death sentence under section 57(1) of prisoners  
Internal Security Act 1960,  
from 1.1.1970 to 31.7.1988**

Year	A	B	C	D	E	F	G	H	I
1970	3	3	-	-	1	1	1	-	
1971	-	-	-	-	-	-	-	-	
1972	1	1	-	-	1	-	-	-	
1973	-	-	-	-	-	-	-	-	
1974	-	-	-	-	-	-	-	-	
1975	-	-	-	-	-	-	-	-	
1976	3	2	-	2	-	-	-	-	
1977	43	36	-	16	-	20	-	1	
1978	1	1	-	1	-	-	-	-	
1979	3	3	-	3	-	-	-	-	
1980	14	14	-	11	-	3	-	-	
1981	9	7	-	5	-	2	-	-	
1982	6	6	-	5	-	1	-	-	
1983	7	7	-	7	-	-	-	-	
1984	4	4	-	3	-	1	-	-	
1985	6	6	-	5	-	-	-	-	1
1986	5	3	-	1	-	-	-	-	2
1987	3	-	-	-	-	-	-	-	
1988	2	-	-	-	-	-	-	-	

- : zero

A : Number of prisoners originally sentenced to death.

B : Number of appeals to the Pardons Board

C : Number of prisoners who received pardon and were released

D : Number of prisoners whose sentences remained and were hanged to death (not according to the year they were hanged)

E : Number of sentences that were commuted to imprisonment for natural life by the Yang di Pertuan Agong

F : Number of sentences that were commuted to life imprisonment by the Yang di Pertuan Agong

G : Number of sentences that were commuted to a term of imprisonment by the Yang di Pertuan Agong

H : Number of sentences that were commuted and detained at the pleasure of the Yang di Pertuan Agong

I : number of sentences awaiting decision from the Pardons Board

It will be noticed that the number of prisoners that have been sentenced to death (column A) do not, in all cases, equate the number that appealed to the Board, (column B). There are three reasons for this.

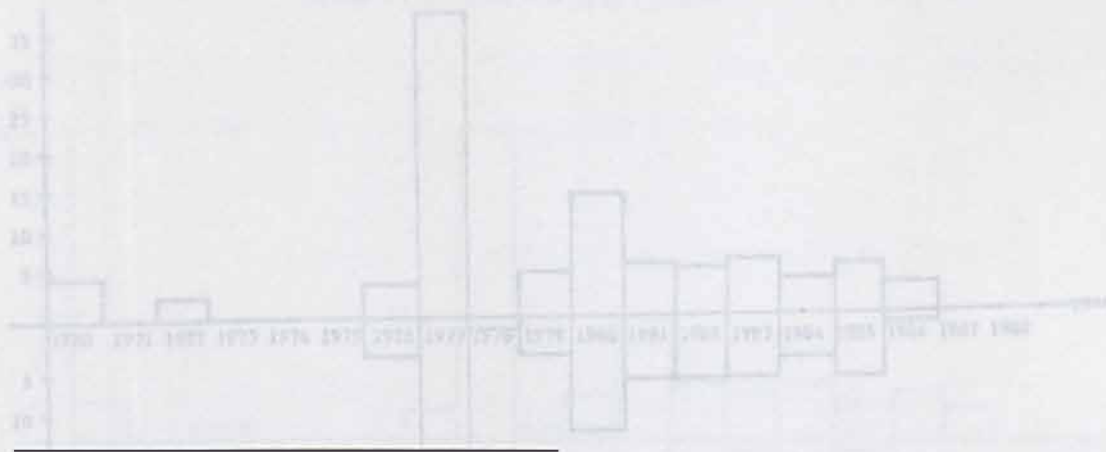
Firstly, if the death sentence was passed by a High Court, upon appeal to the Federal or Supreme Court the sentence and conviction may have been quashed, therefore there is no need to appeal to the Pardons Board anymore. Secondly, an appeal from the High Court may have resulted with the sentence being reduced to imprisonment for natural life, life imprisonment or a term of imprisonment. In this situation, an appeal may still be made to the Pardons Board but it will not be included in this table since it is no longer an appeal from a death sentence. Thirdly, an appeal may not have been made, the sole reason being the case is too recent.

- 
3. Before 5.10.1975, offences under the Internal Security Act 1960 were under state jurisdiction, which means that the Ruler of the State has the power to grant pardons and reprieves in respect of these offences.
  4. See Appendix I and III.



No one who appealed to the Pardons Board received a pardon from the Ruler or Yang di Pertuan Agong, as the case may be.<sup>3</sup> It seems that the Yang di Pertuan Agong is loath to grant a pardon unless there are exceptional circumstances. The fact that the prisoner is repentant, which can be seen from the contents of the letter of petition sent to the Yang di Pertuan Agong or Ruler,<sup>4</sup> is obviously not exceptional enough to warrant a pardon.

Number of  
appeals  
to the  
Pardons  
Board



3. Before 5.10.1975, offences under the Internal Security Act 1960 were under state jurisdiction, which means that the Ruler of the State has the power to grant pardons and reprieves in respect of these offences.
4. See Appendix I and III.

Out of 93 prisoners who appealed to the Pardons Board, 59 appeals were unsuccessful in that the death sentences remained. This means that about 63% of appeals were unsuccessful. This confirms the reluctance of the Yang di-Pertuan Agong to grant a pardon.

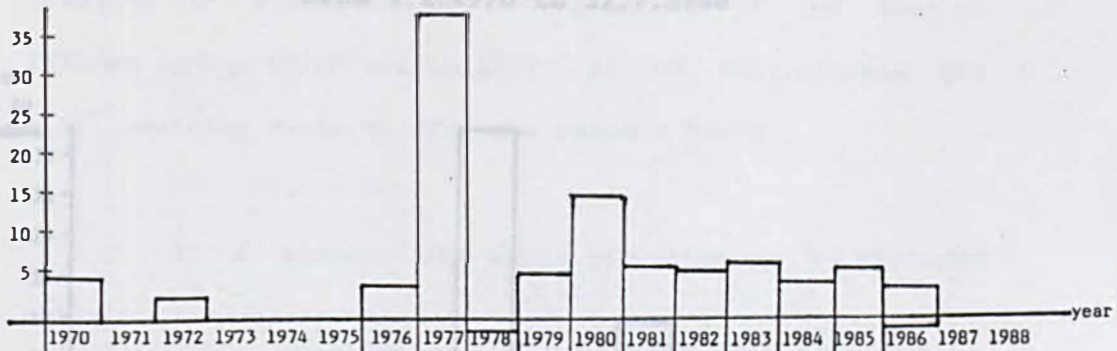
### Bar-chart 3.1

**Number of appeals where the death sentences remained and prisoners were hanged to death from 1.1.1970 to 31.7.1988**

### Bar-chart 3.2

**Number of prisoners whose sentences of death were commuted to life imprisonment from 1.1.1970 to 31.7.1988**

number of  
appeals  
to the  
Pardons  
Board



Number who  
were hanged  
to death  
(not  
according  
to the  
year in  
which they  
were hanged)

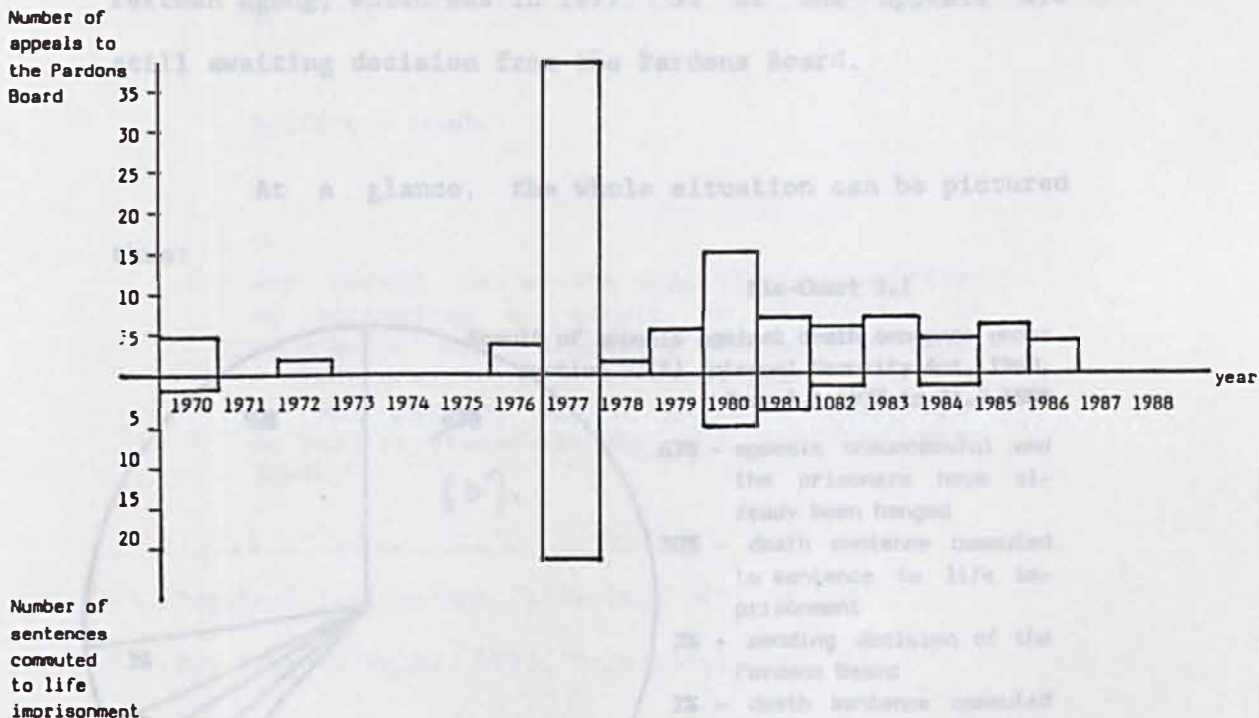


Out of 93 prisoners who appealed to the Pardons Board, 59 appeals were unsuccessful in that the death sentences remained. This means that about 63% of appeals were unsuccessful, thus only confirming the reluctance of the Yang di Pertuan Agong to grant a pardon.

Only 2 sentences, that is, 2% were commuted to imprisonment for natural life, in 1970 and 1972.

Bar-chart 3.2

Number of prisoners whose sentences of death were commuted to life imprisonment from 1.1.1970 to 31.7.1988



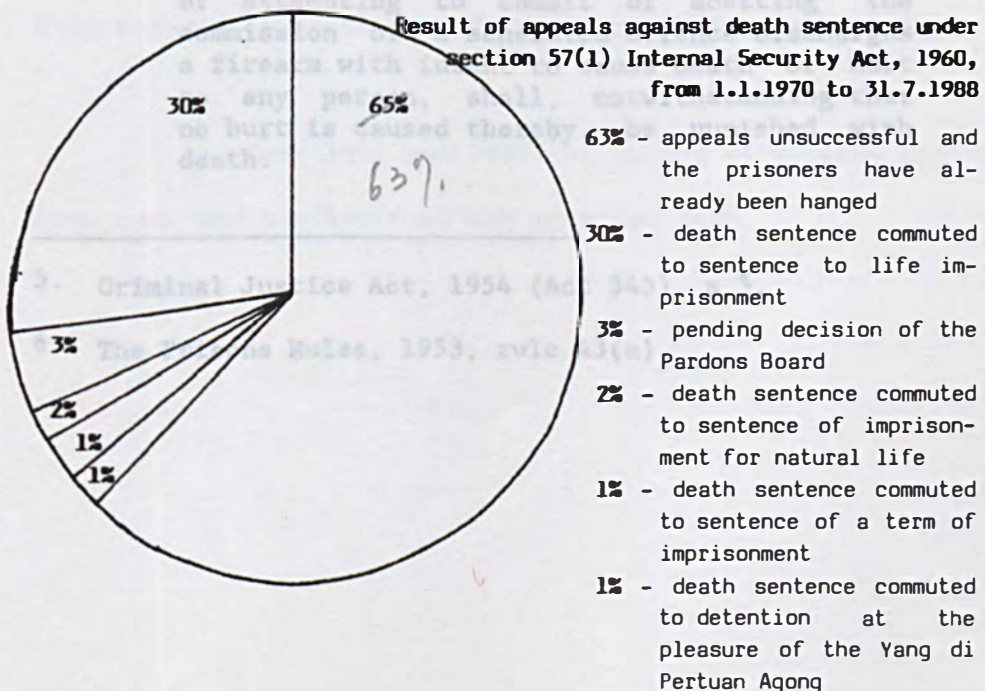
The reluctance of the Yang di Pertuan Agong to alter a death sentence is very much tempered with regards to commuting a death sentence to one of life imprisonment. Compared to the previous bar-charts, it is clear that in this particular area the Yang di Pertuan Agong is more lenient. Out of the 93 appeals made, 28 sentences, that is 30% were commuted to life imprisonment.

All through the years from 1970 to 1988, only one death sentence was commuted to a term of imprisonment, which constitutes about 1% of the total number of appeals. Similarly, only 1% of the death sentence was commuted to detention at the pleasure of the Yang di Pertuan Agong, which was in 1977. 3% of the appeals are still awaiting decision from the Pardons Board.

At a glance, the whole situation can be pictured

thus:

**Pie-Chart 3.1**





It seems that the result of appeals mainly falls into either one of the two bigger categories, which is, the appeal being unsuccessful and therefore the prisoner concerned will be hanged; or his death sentence is commuted to life imprisonment, which is imprisonment for twenty years.<sup>5</sup> Upon remission of one-third of the sentence,<sup>6</sup> a prisoner would be left with thirteen and a half years of imprisonment. Compared to the original sentence of death, a commutation to a sentence of life imprisonment, which at the end of the day entails imprisonment for a little over thirteen years is just as "good" as getting a pardon.

(ii) Sections 3 and 3A, Firearms (Increased Penalties) Act 1971

Section 3 reads:

Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

---

5. Criminal Justice Act, 1954 (Act 345), s 3.

6. The Prisons Rules, 1953, rule 43(a).

Table 3.2

Section 3A reads:

Death sentences under sections 3 and 3A of the  
 Firearms (Increased Penalties) Act, 1971  
 from 1.1.70 to 31.7.1988

Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.

In the years of 1972, 1977 and 1984, the number of appeals made are fewer compared to the number of prisoners originally sentenced to death. In 1972 the death sentence was quashed by the Federal Court. Similarly in 1977, two of the death sentences were quashed by the Federal Court. In 1984, the sentences of death were reduced to sentences of imprisonment for natural life.

As for 1987 and 1988, no record of appeals having been made was available at the material time.

Table 3.2

Death sentence under sections 3 and 3A of the  
Firearms (Increased Penalties) Act, 1971  
from 1.1.70 to 31.7.1988

Year	A	B	C	D	E	F	G	H	I
1970	-	-	-	-	-	-	-	-	-
1971	-	-	-	-	-	-	-	-	-
1972	1	-	-	-	-	-	-	-	-
1973	-	-	-	-	-	-	-	-	-
1974	1	1	-	1	-	-	-	-	-
1975	-	-	-	-	-	-	-	-	-
1976	-	-	-	-	-	-	-	-	-
1977	3	1	-	1	-	-	-	-	-
1978	-	-	-	-	-	-	-	-	-
1979	3	3	-	2	1	-	-	-	-
1980	1	1	-	1	-	-	-	-	-
1981	2	2	-	2	-	-	-	-	-
1982	3	3	-	3	-	-	-	-	-
1983	1	1	-	1	-	-	-	-	-
1984	2	-	-	-	-	-	-	-	-
1985	-	-	-	-	-	-	-	-	-
1986	1	1	-	1	-	-	-	-	-
1987	6	-	-	-	-	-	-	-	-
1988	2	-	-	-	-	-	-	-	-

- : denotes zero.

A : number of appeals to the Pardons Board

B : number of appeals to the Pardons Board

C : number of prisoners who received pardon and were released

D : number of prisoners whose sentences remained and were hanged to death (not according to the year they were hanged)

E : number of sentences that were commuted to a sentence of imprisonment for natural life by the Sultan or Ruler

F : number of sentences that were commuted to a sentence of life imprisonment by the Sultan or Ruler

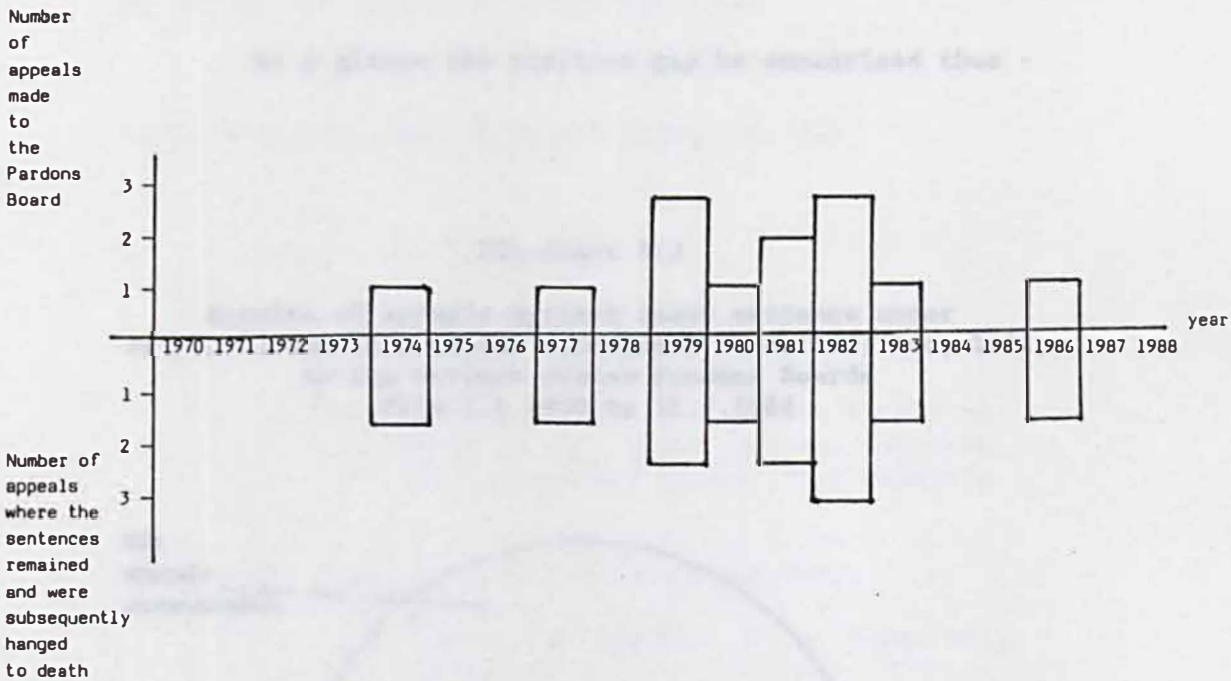
G : number of sentences that were commuted to a term of imprisonment by the Sultan or Ruler

H : number of sentences that were commuted to detention at the pleasure of the Sultan or Ruler

I : number of sentences awaiting decision from the Pardons Board.

Bar-chart 3.3

Number of appeals where the sentences remained  
and prisoners were hanged to death,  
from 1.1.1970 to 31.7.1988





Out of 13 appeals, 12 were unsuccessful. The death sentences remained and the prisoners were hanged to death, which means that 92% of appeals remained unchanged.

Only 1 out of the 13 appeals was commuted to a sentence of imprisonment for natural life, constituting 8% of the total number of appeals.

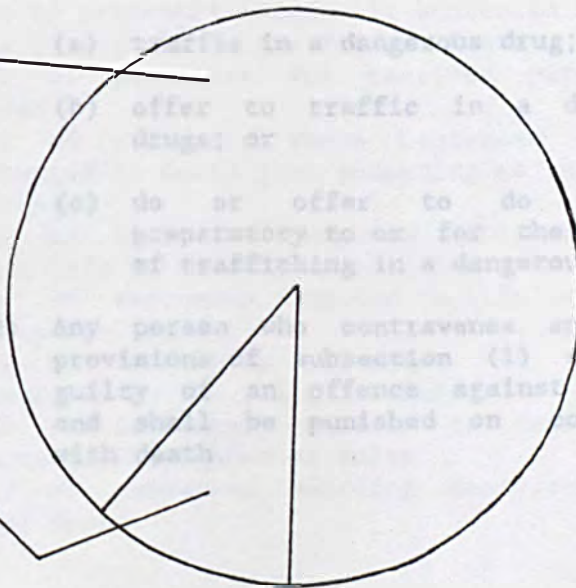
At a glance the position may be summarised thus -

Pie-chart 3.2

Results of appeals against death sentence under section 3 and 3A Firearms (Increased Penalties) Act, 1971, to the various states Pardons Boards from 1.1.1970 to 31.7.1988

92%  
appeals  
unsuccessful

8%  
sentences  
commuted to  
imprisonment  
for  
natural life



The conclusion derived from this chart is that the States' Pardons Boards so far "dismissed" the appeals, with the exception of one appeal where the sentence was commuted to a sentence of imprisonment for the natural life of the prisoner. The reluctance to change the original sentence may be due to the seriousness of the crime committed, as well as the Pardons Boards not finding any grounds to reduce the death sentences.

(a)(iii) Section 39B, Dangerous Drugs Act 1952

Section 39B reads:

- (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drugs; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

- (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this act and shall be punished on conviction with death.

Table 3.3

Death sentence under sections 39B of the  
Dangerous Drugs Act, 1952 from 1.1.1970 to 31.7.1988

Year	A	B	C	D	E	F	G	H	I
1970	-	-	-	-	-	-	-	-	-
1971	-	-	-	-	-	-	-	-	-
1972	-	-	-	-	-	-	-	-	-
1973	-	-	-	-	-	-	-	-	-
1974	-	-	-	-	-	-	-	-	-
1975	-	-	-	-	-	-	-	-	-
1976	-	-	-	-	-	-	-	-	-
1977	-	-	-	-	-	-	-	-	-
1978	-	-	-	-	-	-	-	-	-
1979	4	4	-	4	-	-	-	-	-
1980	7	7	-	7	-	-	-	-	-
1981	12	12	-	12	-	-	-	-	-
1982	12	11	-	8	-	3	-	-	-
1983	10	10	-	10	-	-	-	-	-
1984	27	21	-	19	-	-	-	-	2
1985	32	12	-	5	-	-	-	-	7
1986	42	10	-	5	-	1	-	-	4
1987	39	-	-	-	-	-	-	-	-
1988	27	-	-	-	-	-	-	-	-

- : zero.

A : number of prisoners originally sentenced to death

B : number of appeals to the Pardons Board

C : number of prisoners who received pardon and were released

D : number of prisoners whose sentences remained and were hanged to death (not according to the year they were hanged)

E : number of sentences commuted to imprisonment for natural life by the Sultan or Ruler.

F : number of sentences commuted to life imprisonment by the Sultan or Ruler

G : number of sentences commuted to a term of imprisonment by the Sultan or Ruler

H : number of sentences commuted to detention at the pleasure of the Sultan or Ruler

I : number of sentences awaiting decision from the Pardons Board.

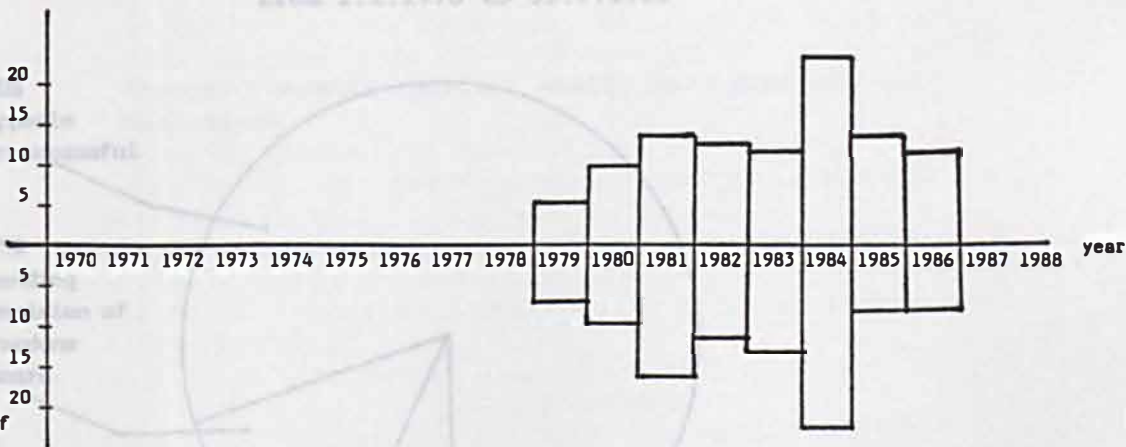
From 1984 to 1988, the difference in number between the original number sentenced to death (column A) and the number who appealed to the Pardons Board (column B) is rather marked. Especially from 1985 to 1988, the great difference is due to the fact that most of the sentences were waiting for the result of appeals to the Supreme Court. That is why, the number of appeals to the Pardons Board is very low, as most of the cases have not exhausted all the legal channels at the time.

#### Bar-chart 3.4

Number of appeals where the sentences remained, and prisoners were hanged to death, from 1.1.1970 to 31.7.1988

Number of  
appeals  
made to  
the Pardons  
Board

Number of  
appeals  
whereby the  
sentences  
remained  
and  
prisoners  
were hanged  
to death





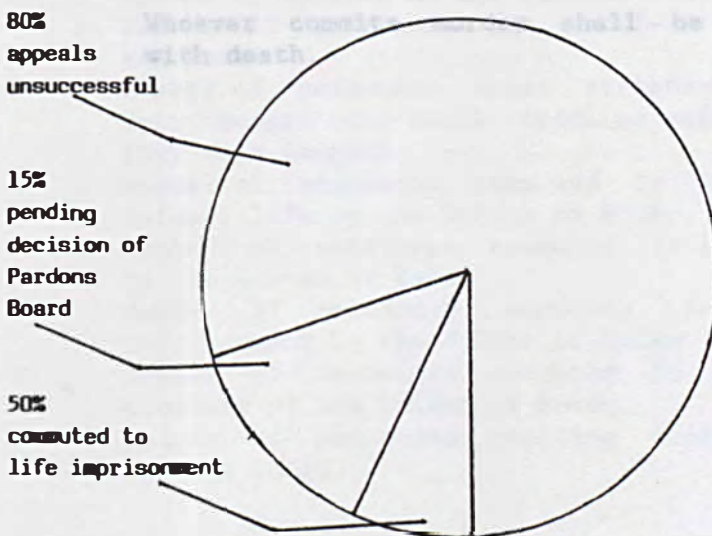
In 1979, 1980, 1981 and 1983, all the appeals failed. In 1982, out of 11 appeals made, 3 were commuted to life imprisonment and the rest were all unsuccessful. In 1986, only 1 out of 10 appeals were commuted to life imprisonment. 5 appeals were unsuccessful and the remaining 4 are still awaiting the decision of the relevant Pardons Board.

In 1984, 19 out of 21 appeals were unsuccessful. 2 appeals are still awaiting decision. In 1986, out of 12 appeals, 5 were unsuccessful and 7 are still awaiting the decision of the Pardons Board.

(A)(U) Section 39B of the Penal Code (F.M.S. Cap. 45)

**Pie-chart 3.3**

**Result of appeals against death sentence  
under section 39B of the Dangerous Drugs Act, 1952,  
from 1.1.1970 to 31.7.1988**



Out of the total of 87 appeals made to the various States' Pardons Boards throughout 1970 to 1988, 70 were unsuccessful which resulted in the prisoners being hanged. This constitutes 80% of the total number of appeals. Only 4 death sentences were commuted to life imprisonment, which is 5% of the total number of appeals. 13 appeals are still awaiting the decision of the Pardons Board, constituting 15% of the total sum.

Again, as in the previous pie-charts, the biggest percentage is that whereby the sentences remain unaltered.

(a)(iv) Section 302 of the Penal Code (F.M.S. Cap. 45)

Section 302 reads:

Whoever commits murder shall be punished with death.

Table 3.4

**Death sentence under section 302 of the Penal Code  
from 1.1.1970 to 31.7.1988**

Year	A	B	C	D	E	F	G	H	I
1970	11	2	-	2	-	-	-	-	-
1971	4	4	-	3	-	-	1	-	-
1972	11	6	-	3	1	2	-	-	-
1973	1	1	-	-	1	-	-	-	-
1974	3	1	-	1	-	-	-	-	-
1975	7	2	-	-	-	1	1	-	-
1976	7	2	-	-	-	2	-	-	-
1977	6	4	-	3	-	1	-	-	-
1978	5	3	-	2	-	1	-	-	-
1979	3	3	-	-	1	2	-	-	-
1980	3	2	-	1	-	1	-	-	-
1981	3	2	-	2	1	-	-	-	-
1982	6	6	-	5	-	1	-	-	-
1983	12	11	-	8	-	2	-	-	1
1984	5	2	-	2	-	-	-	-	-
1985	6	4	-	3	-	-	-	-	1
1986	6	1	-	-	-	-	-	-	1
1987	8	-	-	-	-	-	-	-	-
1988	-	-	-	-	-	-	-	-	-

- or : zero.

A : number of prisoners originally sentenced to death

B : number of appeals to the Pardons Board

C : number of prisoners who received pardon and were released

D : number of prisoners whose sentences remained and were hanged to death (not according to the year they were hanged)

E : number of sentences commuted to imprisonment for natural life by the Sultan or Ruler.

F : number of sentences commuted to life imprisonment by the Sultan or Ruler

G : number of sentences commuted to a term of imprisonment by the Sultan or Ruler

H : number of sentences commuted to detention at the pleasure of the Sultan or Ruler

I : number of sentences awaiting decision from the Pardons Board.

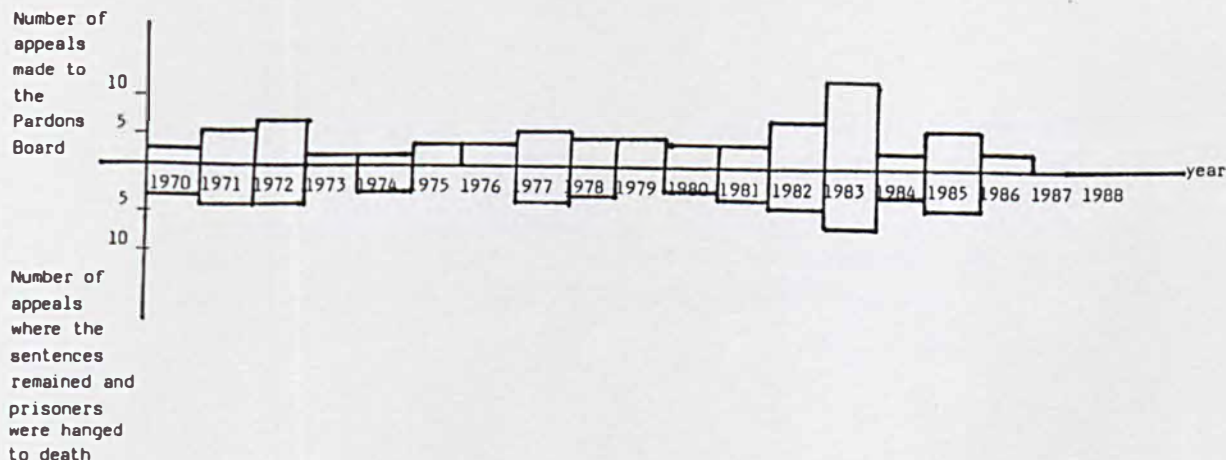
In 1981, 2 appeals were made to the Pardons Board. (column B). Both appeals failed (column D) and one of the prisoners concerned appealed again, which resulted in the death sentence being commuted to imprisonment for natural life. This explains why, out of 2 appeals made, there were 'three decisions" (columns D and E).

Result of appeals against death sentences under section 302 of the Penal Code.

The different figures in columns A and B, as in all the other tables above, is due to several reasons; such as the original death sentence being quashed upon appeal to the Federal or Supreme Court, or the death sentence was substituted for a lesser sentence or due to the death of the prisoners before any appeals to the Pardons Board could be made. These reasons are the same for all subsequent tables.

Bar-chart 3.5

Number of appeals where the sentences remained and prisoners were hanged to death from 1.1.1970 to 31.7.1988



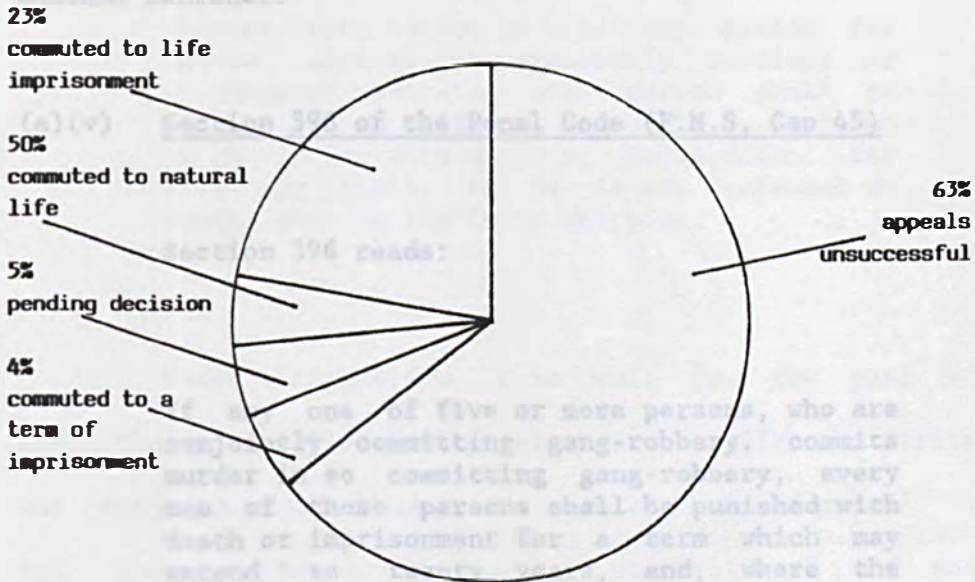


Here again, in almost every year, there will be unsuccessful appeals. In the years 1970, 1981 and 1984, the percentage of unsuccessful appeals was 100%. In the other years the majority of appeals were also unsuccessful.

constituting 4% and the remaining 5%, that is, 3 appeals are still awaiting decision.

**Pie-chart 3.4**

**Result of appeals against death sentence under section 302 of the Penal Code, from 1.1.1970 to 31.7.1988**



Out of the total of 56 who appealed, 35 appeals failed, constituting 5%. 13 sentences were commuted to life imprisonment, which is 23% being successful and 2 sentences were commuted to a term of imprisonment, constituting 4% and the remaining 5%, that is, 3 appeals are still awaiting decision.

The statistics appearing below are for death sentences which are not mandatory, but operating only as a maximum sentence.

(a)(v) Section 396 of the Penal Code (F.M.S. Cap 45)

Section 396 reads:

If any one of five or more persons, who are conjointly committing gang-robbery, commits murder in so committing gang-robbery, every one of those persons shall be punished with death or imprisonment for a term which may extend to twenty years, and, where the punishment is not death, shall also be liable to whipping.

The Pardon Board involved is the Pardon Board of Sarawak. The commutation to 20 years is not referred to as life imprisonment because in Sarawak life imprisonment means what we know as imprisonment for natural life. This is because the Criminal Justice Act, 1953 is not extended to East Malaysia.

For this section, information is only available for the year of 1986. In 1986, 3 people were sentenced to death and all three appealed to the Pardons Board. All three sentences were commuted to imprisonment for 20 years.

(a)(vi) Section 3(1), Kidnapping Act 1961

Section 3(1) reads:

Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

Under this section, it is only for the year of 1985 that statistics were obtainable. In 1985, one person was sentenced to death under the section. Upon appeal to the Pardons Board, the appeal was rejected and the prisoner was subsequently hanged.

7. The Pardons Board involved is the Pardons Board of Sarawak. The commutation to 20 years is not referred to as life imprisonment because in Sarawak life imprisonment means what we know as imprisonment for natural life. This is because the Criminal Justice Act, 1953 is not extended to East Malaysia.

## Summary

Table 3.5

Total number of death sentences, appeals to Pardons Boards and the results thereof from 1.1.1970 to 31.1.1988

Year	A	B	C	D	E	F	G	H	I
1970	14	5	-	2	1	1	1	-	-
1971	4	4	-	3	-	-	1	-	-
1972	13	7	-	3	2	2	-	-	-
1973	1	1	-	-	1	-	-	-	-
1974	4	2	-	2	-	-	-	-	-
1975	7	2	-	-	-	1	1	-	-
1976	10	4	-	2	-	2	-	-	-
1977	52	41	-	20	-	21	-	1	-
1978	6	4	-	3	-	1	-	-	-
1979	13	13	-	9	2	2	-	-	-
1980	25	24	-	20	-	4	-	-	-
1981	26	23	-	21	1	2	-	-	-
1982	27	26	-	21	-	5	-	-	-
1983	30	29	-	26	-	2	-	-	1
1984	38	27	-	24	-	1	-	-	2
1985	45	23	-	14	-	-	-	-	9
1986	57	18	-	7	-	1	3	-	7
1987	56	-	-	-	-	-	-	-	-
1988	31	-	-	-	-	-	-	-	-

- : zero.

A : total number of death sentences originally passed

B : total number of appeals made to the various Pardons Board

C : total number of those who received pardon

D : total number of unsuccessful appeals, and the prisoners were subsequently hanged (not according to the year they were hanged)

E : total number of death sentences that were commuted to imprisonment for natural life

F : total number of death sentences that were commuted to life imprisonment

G : total number of death sentences that were commuted to a term of imprisonment

H : total number of death sentences that were commuted to detention at the pleasure of the Yang di Pertuan Agong or Ruler

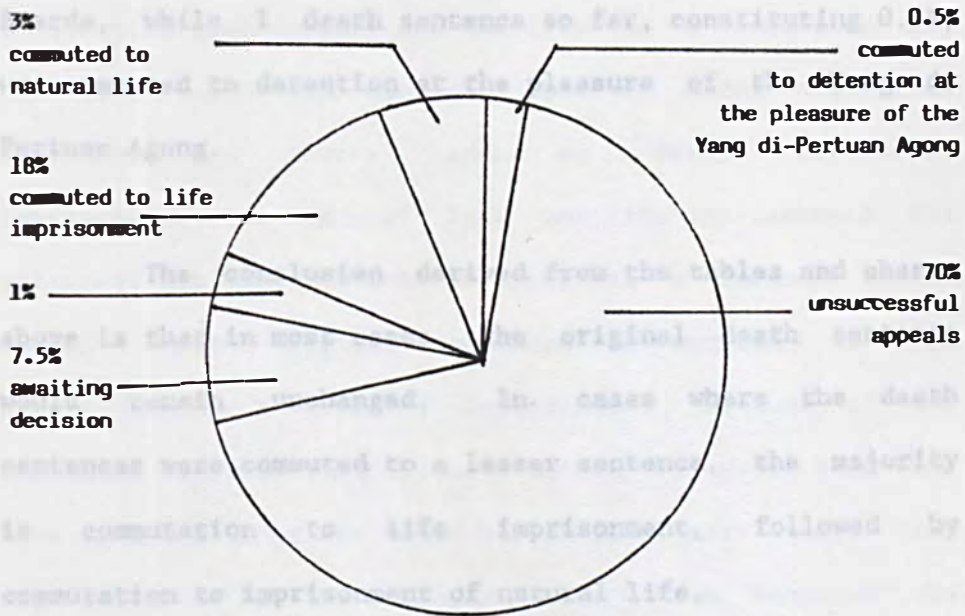
I : total number of death sentences awaiting decision from the Pardons Boards.



In 1981, 23 appeals were made to the various Pardons Boards. Two sentences were commuted to life imprisonment and 21 other sentences remained the same. A second appeal was made by one of the prisoners and his death sentence was later commuted to a sentence of imprisonment for natural life.

Pie-chart 3.5

Result of all appeals against death sentences that have been passed, from 1.1.1970 to 31.7.1988



Altogether, 253 appeals were made to the various Pardons Boards from 1.1.1970 to 31.7.1988. Out of this figure, 176 were unsuccessful and the prisoners were subsequently hanged, constituting 70% of the total number of appeals; 7 appeals had their death sentences commuted to imprisonment for natural life, constituting 3%. Forty five sentences were commuted to life imprisonment, which is 18% and 1%, that is 3 sentences were commuted to a term of imprisonment. 7.5% of the appeals, that is 19 appeals, are still awaiting the decision from the various Pardons Boards, while 1 death sentence so far, constituting 0.5%, was commuted to detention at the pleasure of the Yang di Pertuan Agong.

The conclusion derived from the tables and charts above is that in most cases, the original death sentence would remain unchanged. In cases where the death sentences were commuted to a lesser sentence, the majority is commutation to life imprisonment, followed by commutation to imprisonment of natural life.

Those whose sentences were commuted to life imprisonment would gain the most. Not only were their sentences altered from death to twenty years' imprisonment, but upon remission, those prisoners would be released after serving about thirteen and a half years of imprisonment. Therefore in effect their commutation would

be, from a sentence of death to thirteen and a half years of imprisonment. It is equivalent to getting "two commutations." It seems therefore, that there may be instances where the remission system results in a situation that is unintentional and probably totally undesired. A remission on its own is already a process of 'automatic pardon' - the word 'pardon' here being used in the loose sense. Maybe if the prisoners concerned are not making any appeals to any Pardons Board, the remission system is justified; to serve as an incentive to prisoners to maintain good conduct and the like, as a remission may be lost upon bad conduct. But in cases where the sentences are severe, such as death sentences, imprisonment for natural life and life imprisonment, the prisoners are bound to make an appeal to a Pardons Board. Should their original sentences be commuted to life imprisonment or a term of imprisonment, because of the remission system, the actual number of years that they have to spend in prison would be a few years fewer than was intended by the Pardons Board which commuted the original sentence.

Thus it is suggested that for sentences that is the result of a commutation, the one-third remission should not apply, as this would defeat the whole purpose of the commutation. In this regard, a new provision or amendment may be necessary in the Prisons Rules of 1953.

(b) Imprisonment for natural life(b)(i) Internal Security Act 1960

In 1972, a death sentence was passed for a conviction under section 57(1). Upon appeal, this sentence was commuted to imprisonment for natural life on the 21.8.1973 by the High Court of Sib. Upon appeal to the Pardons Board, the Yang di Pertua Negeri of Sarawak granted a pardon and the prisoner was released on 1.7.1980. Thereafter, no one else has been sentenced to imprisonment for natural life.

(b)(ii) Section 4 and 5 of the Firearms (Increased Penalties) Act, 1971

Section 4 reads:

Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence or robbery exhibits a firearm in a manner likely to put any person in fear of death or hurt shall be punished with imprisonment for life and with whipping with not less than six strokes.

Section 5 reads:

Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence has on his person a firearm shall be punished with imprisonment for life and with whipping with not less than six strokes.



Table 3.6

**Imprisonment for natural life under sections 4 and 5  
of the Firearms (Increased Penalties) Act, 1971  
from 1.1.1974 to 31.7.1988<sup>8</sup>**

Year	A	B	C	D	E	F
1974	1	1	-	1	-	-
1975	2	1	-	1	-	1
1976	8	5	-	2	3	3
1977	1	-	-	-	-	1
1978	6	1	-	-	1	5
1979	11	3	-	2	1	8
1980	6	-	-	-	-	6
1981	4	1	-	-	-	4
1982	6	1	-	1	-	5
1983	8	-	-	-	-	8
1984	8	1	-	1	-	7
1985	6	-	-	-	-	6
1986	6	-	-	-	-	6
1987	7	-	-	-	-	7
1988	4	-	-	-	-	4

- : zero

A : Number of prisoners serving imprisonment for natural life

B : Number of prisoners who appealed to the Pardons Board

C : Number who received pardon and were released

D : Number who did not receive pardon and sentence remained

E : Number of sentences commuted to life imprisonment i.e. 20 years by the Pardons Board.

F : Number of prisoners that are serving their sentence without appealing to the Pardons Board, or died, or escaped from prison or committed suicide, or pending appeal from the Supreme Court and others.

8. Some of those who served natural life imprisonment were initially sentenced to death. On appeal, the sentence of death was later substituted to imprisonment for natural life by the Federal or Supreme Court. In some cases, the original death sentences were commuted to imprisonment for natural life upon appeal to the Pardons Board.

The total number of prisoners serving imprisonment for natural life is shown in Column A. However, these figures are not accurate, in the sense that the figures do not represent the number of prisoners originally sentenced to imprisonment for natural life. The main reason for this is probably because not many are tried and found guilty under these two sections. Thus in column B, which denotes the number of prisoners who appealed to a Pardons Board, it seems that most of the prisoners do not appeal. In actual fact, this is not so, since some of the sentences in column A are as the result of commutations by various Pardons Boards.

In 1981, one prisoner appealed to the Pardons Board, but the Board refused to consider the appeal as they were of the opinion that it was too early to consider any appeal from the particular prisoner. Therefore a Pardons Board has the power to even refuse to consider an appeal should it elect to do so. In this particular instance, the date of sentence was 28.12.1981 and the date of appeal to a Pardons Board was 30.6.1986. There is a lapse of about four and a half-years from the date of sentence before an appeal to a Pardons Board was made. This could be due to waiting for the result of appeal to the Supreme Court. It is rather strange that the reason given for the Pardon's Board's refusal to consider the appeal was because it was 'too early' to be considered.

According to rule III(I) of the Prisons Rules, 1953;<sup>9</sup> a prisoner may petition to a Pardons Board on the completion of one year of his sentence and a second such petition is allowed when a prisoner has completed three years from the date of conviction. Therefore if a prisoner has been serving his sentence for four years, as in the present case, theoretically he could have petitioned the Pardons Board twice.

In the instant case, the prisoner had already served four and a-half years of his sentence. It therefore cannot be too early for his appeal to be considered if rule III(I) above is applied.

On the other hand, as already mentioned above, the original sentence may have been passed by a High Court and upon appeal to the Supreme Court, the sentence was upheld. It is possible that the Pardons Board was referring to the lapse of time between the decision of the Supreme Court and the date of appeal to the Pardons Board; as making the appeal too early to be considered. But this presumption is contradictory to the wording of rule III(1) of the Prisons Rules 1953. Moreover this interpretation cannot have been the intention of rule III. It is clear

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<sup>9</sup>. Hereinafter referred to as rule III(I).

that the right to petition arises after a prisoner has served one year of his sentence, which means a year from the date of conviction, not from the date the sentence is confirmed, assuming that the sentence was passed by a High Court and an appeal was <sup>subsequently</sup> made to the Supreme Court.

However, there is an anomaly in rule III(I) itself. Any petition to any Pardons Board can only be made when all legal remedies have been exhausted. Therefore by providing a prisoner with the right to petition after the completion of one year of his sentence, when most probably he is still awaiting the result of an appeal to the Supreme Court, is pointless. As such it is felt that the wordings in rule III should be changed. If there is to be any bar at all, maybe the one-year period should begin from the date of decision of the highest court in the land. In this way, a prisoner would be subject to a one-year bar upon the exhaustion of all legal remedies before any appeal can be made to a Pardons Board.

But it is difficult to see the justification for imposing a time limit before a prisoner can appeal to a Pardons Board. If the reason is to ensure that the prisoner is repentant before he appeals, the argument against this is that whilst waiting for the outcome of his appeal to the Supreme Court, he had ample time for

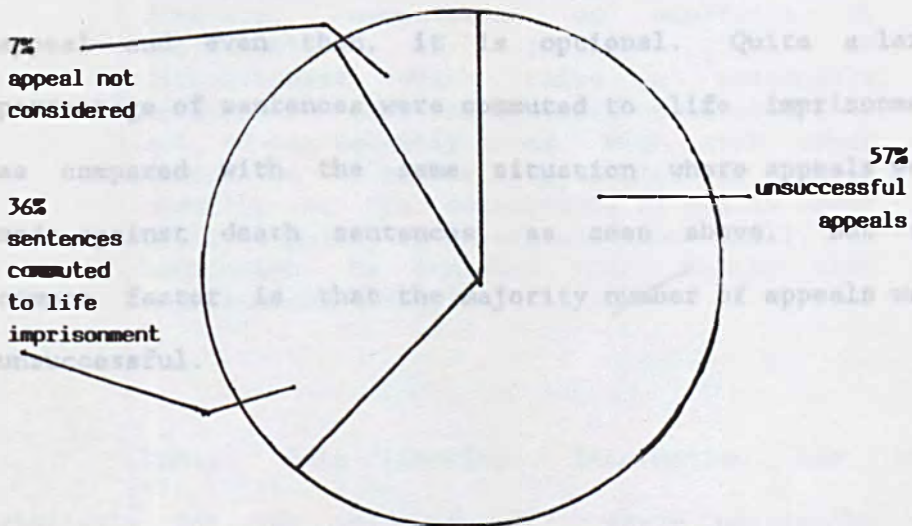


repentance. As such, as soon as the Supreme Court reaches its decision, the right to petition should arise. If there is to be any restriction at all, it should be directed to what types of sentences or offences that are appealable to the Pardons Board. It is suggested that only prisoners who are serving a substantial number of years are eligible to petition, for instance, after remission, he still has 5 years to serve.

In short, the position is the same as for death sentences. No data is available with regards to imprisonment for natural life under other statutes.

Pie-chart 3.6

Result of appeals against sentences of imprisonment for natural life from 1.1.1974 to 31.7.1988



Fourteen appeals were made to various Pardons Boards and 8, constituting 57% sentences remained the same. Five sentences, which is 36% were commuted to life imprisonment and 1 appeal was not considered, which is the remaining 7% of the total percentage.

### Summary

In short, the position is the same as for death sentences, in that most appeals to the Pardons Board are unsuccessful. However, the difference is that in imprisonment for natural life, not as many appeals are made to the Pardons Boards. This is probably because under death sentences, the appeals were 'automatic', as explained earlier whereas for other sentences, the prisoners are subject to a one-year bar before they could appeal and even then, it is optional. Quite a large percentage of sentences were commuted to life imprisonment as compared with the same situation where appeals were made against death sentences, as seen above. But the common factor is that the majority number of appeals were unsuccessful.

(c) Life imprisonment

According to the available records, petitions to the Yang di Pertuan Agong or Ruler as the case may be, against sentences of life imprisonment are usually made as a result of convictions under section 58(1) Internal Security Act, 1960 and section 6B Dangerous Drugs Act, 1952.

(c)(i) Section 58(1), Internal Security Act 1960

Section 58(1) reads -

Any person who in any security area consorts with or is found in the company of another person who is carrying or has in his possession or under his control any fire-arm, ammunition or explosive in contravention of section 57, in circumstances which raise a reasonable presumption that he intends, or is about, to act, or has recently acted, with that other person in a manner prejudicial to public security or the maintenance of public order shall be guilty of an offence and shall, on conviction, be punished with death or with imprisonment for life.

Under this section, information was only available for the year of 1977, where originally 25 persons were sentenced to life imprisonment. Upon appeal to the Federal Court, one sentence was changed and reduced to a term of imprisonment. Out of the 24 prisoners

serving life sentences in 1977, 10 were released on the twenty-fifth year of Independence, which was on 31.8.1982. Incidentally, a total of 279 prisoners who were serving terms for petty offences were released from prisons under a general amnesty on this date.<sup>10</sup>

It seems that it was quite common for some prisoners who only had a few more years to serve in prison, to be released on certain occasions such as the birthdays of the Yang di Pertuan Agong or Ruler, or on Independence Day. For instance 93 prisoners throughout Malaysia, namely in the states of Johor, Pahang, Kelantan, Perak, Melaka, Pulau Pinang and Negeri Sembilan were released on the tenth anniversary of Independence.<sup>11</sup>

(c)(ii) Section 6B, Dangerous Drugs Act 1952

Section 5B(1) reads -

No person shall -

- (a) either on his own behalf or on behalf of any other person, plant or cultivate any plant from which raw opium, coca leaves, poppy-straw or cannabis may be obtained either directly or indirectly;

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10. The News Straits Times, 2.9.1982.

11. The Straits Times, 31.8.1967. It is also common for the Sultans to grant a pardon to prisoners on their birthdays. Normally this would only be to those prisoners who would only have a few months more to completely serve their term of imprisonment.



(b) allow any plant, from which raw opium, coca leaves, poppy-straw or cannabis may be obtained either directly or indirectly, to be planted or cultivated by some other person on land owned or occupied by him or in any receptacle on such land; or

(c) allow any plant, from which raw opium, coca leaves, poppy-straw or cannabis may be obtained either directly or indirectly, planted or cultivated by some other person on land owned or occupied by him or in any receptacle on such land, to remain on such land or in such receptacle.

Section 6B(3) reads -

Any person who contravenes the provisions of this section shall be guilty of an offence against this Act and shall be punished on conviction with imprisonment for life and with whipping of not less than six strokes.

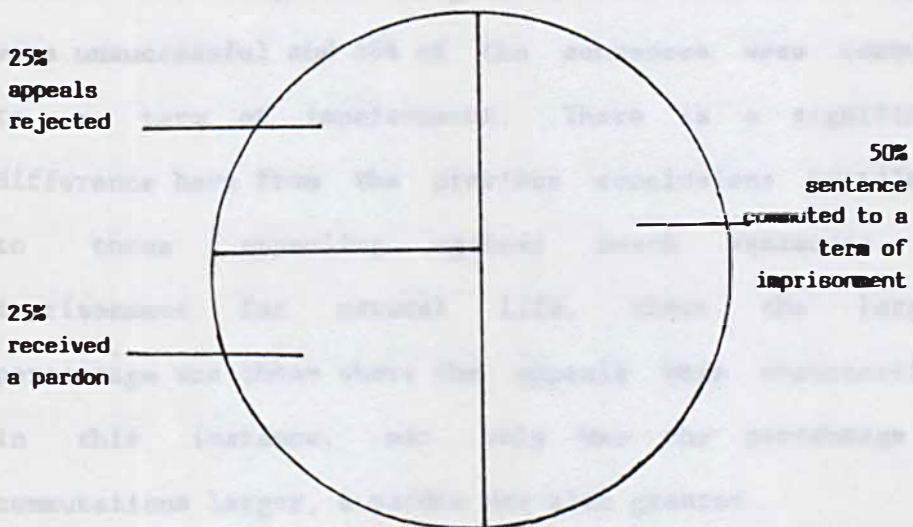
From 1976 to 1988, 354 persons were originally sentenced to life imprisonment. Only 4 appeals were made to the Pardons Board, 1 in 1976, which appeal was rejected and the prisoner is now still serving his sentence. The 3 other appeals were made in 1979. The result is that for two appeals, the sentences were reduced to a term of imprisonment and one prisoner was granted a pardon. In this particular case, the prisoner was granted a special

pardon by the Duli Yang Maha Mulia Sultan of Kedah on 17 June 1982. The prisoner was already 65 years old on the date of conviction and was 68 years old upon release. The reason why the special pardon was granted was because the prisoner could not withstand prison regulations due to her age and general health condition.

Out of 354 sentences of life imprisonment, 40 convictions were quashed by the Federal or Supreme Court and 2 sentences were reduced to a term of imprisonment by the Federal or Supreme Court. The remaining 308 prisoners are still serving their sentences as at 31.7.1988.

**Pie-chart 3.7**

**Result of appeals against sentences of life imprisonment under section 6B Dangerous Drugs Act, 1952 from 1.1.1976 to 31.7.1988**



Out of the total of 4 appeals made, 1 appeal, constituting 25%, was rejected, 2, that is 50% were commuted to a sentence of a term of imprisonment and the remaining 1 or 25% was granted a special pardon.

No materials are available with regards to persons sentenced to imprisonment for life under other statutes.

#### Summary

There is no record of whether the remaining 14 prisoners who were serving a sentence of life imprisonment in 1977, made any petitions to the Yang di Pertuan Agong.

As for sentences of life imprisonment under section 6B, Dangerous Drugs Act, 1952, only 25% of appeal were unsuccessful and 50% of the sentences were commuted to a term of imprisonment. There is a significant difference here from the previous conclusions pertaining to those appealing against death sentences and imprisonment for natural life, where the largest percentage was those where the appeals were unsuccessful. In this instance, not only was the percentage of commutations larger, a pardon was also granted.

If the results of appeals to the various Pardons Boards, against all three sentences were put together, one will detect a pattern whereby as the sentences get less severe, the percentage of appeals who received commutations also increased. It is as though the Yang di Pertuan Agong or Ruler, as well as other members of the Pardons Board are more lenient the less severe the original sentence is.

In the absence of any reasons or explanations, and with due respect to all members of the Pardons Boards, this 'trend' is rather puzzling. One would have thought that if there is to be any leniency practised, it would be directed to the more severe sentences and not otherwise. This is because if a person who is sentenced to life imprisonment appeals to the Pardons Board and the appeal was unsuccessful, which therefore means that the prisoner has to spend about 40 months in prison, (that is, after remission he will be released after 40 months). By not receiving a commutation from the Yang di-Pertuan Agong or Ruler, this may well be good in that the time spent in prison will actually rehabilitate the prisoner so that by the time he is released from prison he has really turned over a new leaf.



Of course the situation is entirely different for a prisoner who is facing a death sentence. An unsuccessful appeal to the Pardons Board would cost him his life. Then again, it is arguable whether by granting him a commutation, to say, life imprisonment, which therefore means he will be free after 40 months in prison, he will be rehabilitated.<sup>12</sup> Suppose his death sentence was commuted to imprisonment for natural life - is it better for him to live in confinement for the rest of his life or to die? While these are pertinent questions, they fall outside the ambit of the present dissertation.

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12. The Report of the Royal Commission on Capital Punishment, 1949-1953 in England was that the death sentence had failed as a deterrent in cases of murder but the deterrent value of the death sentence was clearly seen in its effects on professional crimes.

See also Hans Zeisel, "The Deterrent Effect of the Death Penalty: Facts v Faith, in *The Death Penalty in America* (Third Ed) Oxford University Press (1982) where upon statistical research he found that the death penalty did not deter the commission of crimes entailing death sentences.

## CHAPTER V

### THE POWER OF PARDON IN OTHER JURISDICTIONS

Since Malaysia's legal system generally is "borrowed" from English law having regard to its historical origin (see earlier discussion - Chapter II) it is considered useful to compare the legal provisions governing pardon in England. In like manner, India has been selected as another country to compare the Malaysian position with. India, like Malaysia applies English principles of law inherited from its colonial past. Moreover, much of Malaysia's constitutional provisions are adapted or adopted from the Indian Constitution.

#### A. INDIA<sup>1</sup>

##### (a) Legal sources of the power of pardon

The legal source of pardoning power in India lies within the provisions of the Constitution of India itself. The power of pardon is granted to the President and the Governors of the various States. The power of pardon has been granted to the President of India by article 72, and to the Governors of States, by article 161 of the Constitution.

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1. See Chitaley & Rao, The Constitution of India; 2nd ed. Vol 2 pg 798-813, 820-824 and Vol 3 pg 295-299, 303-309. See also M.P. Jain, Indian Constitutional Law; 4th ed. 1987 pg. 87-100, 108-9.

(b) Article 72 reads as follows:

(1) Criminal Procedure Code 1973

(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence -

(a) in all cases where the punishment or sentence is by a court-martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

Article 161 states:

of the power of the Governor of a State

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

(b) Analogous Law(i) Criminal Procedure Code 1973

Section 32 of the Indian Criminal Procedure Code, 1973, (hereinafter referred to as the Code) provides that the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of the sentence or remit the whole or any part of the sentence to which he has been sentenced.

Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion certified copy of the record of the trial or of such record thereof as exists. This section actually empowers the Government of sections 30, 31 and 32 of the Code. Under this section the Government may suspend or remit sentences of death.<sup>2</sup>

2. See A.B. Mitra, *Code of Criminal Procedure*, 15th ed., Calcutta, All India Law Agency, 1968, pp. 561-69.



(14) This section applies only to persons sentenced to imprisonment. It clearly provides both for remission and of suspension of a sentence with or without conditions. Where a sentence has been suspended without any condition, it does not amount to remission. Indisputably, Article 161 of the Constitution is of much wider latitude enabling the Governor to give an unconditional and absolute pardon, while section 432 does not empower him to do any such thing.

Section 433 provides that the appropriate Government may, without the consent of the person sentenced commute a sentence of death for any other punishment provided by the Indian Penal Code; a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine; a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine; a sentence of simple imprisonment, for fine.

This section actually incorporates the substance of sections 54, 55 and 55A of the Indian Penal Code. Under this section too, the Governor can commute a sentence of death.<sup>2</sup>

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2. See B.B. Mitra, Code of Criminal Procedure, 15th ed. Calcutta, Debooks Eastern Law House, 1979, pg. 861-69.

(ii) Penal Code

Under section 54 of the Penal Code it is stated that in every case in which the sentence of death shall have been passed the appropriate Government may, without the consent of the offender, commute the sentence for any other sentence provided by the Code.

Under section 55 of the Penal Code, it is further provided that in every case in which a sentence of imprisonment for life may have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

(c) Scope of Article 72

The powers conferred on the President under this Article, though judicial in nature, are to be exercised by him in the exercise of executive functions. When the President exercises these powers he is not doing so as a judicial or quasi-judicial authority and he is not required to follow the rules of natural justice by giving a hearing to the parties concerned. The power of pardon in India and the other allied powers of reprieves, suspension of sentence and so forth can be exercised during the pendency of a judicial proceeding.

The question regarding the basis upon which the President's power under Article 72 ought to be exercised has cropped up before the Supreme Court in a few cases.

In Maru Ram v Union of India,<sup>3</sup> the Supreme Court ruled that all public power, including constitutional power, shall never be exercisable arbitrarily or with mala fide. Public power which rests on a "high pedestal" has to be exercised justly. The court said that though considerations for the exercise of power under Article 72 (the same goes for Article 161) may be "myriad and their occasion protean" and would best be left to the appropriate government, yet, if in any case the power to pardon, commute or remit is exercised on irrational, irrelevant, discriminatory or mala fide considerations, the courts would intervene if necessary. The Supreme Court suggested that the government make rules for its own guidance in the exercise of the power of pardon and at the same time retaining a large residuary power to meet "special situations" or "sudden developments." This will avoid the pitfall of discrimination in the exercise of this power. The court also clarified that the President is to exercise this power on the advice of his Ministers.

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3. 1981 1 SCC 107.

In the most recent case, Kehar Singh v Union of India,<sup>4</sup> the Supreme Court held that it may not be possible to lay down any precise and clearly defined guidelines as the power under Article 72 is of the widest amplitude. The court went on to say it can contemplate myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing needs and passing time. It is of great significance that the function itself enjoys high status in the constitutional scheme.

The Supreme Court also said that in the exercise of the power in Article 72, the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded. The President is entitled to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. He can, on scrutiny of the evidence on record in the criminal case, come to a conclusion different from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused, and in doing so the President does not amend or modify or supersede the judicial record.

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4. 1989 1 SCC 204.



(d) Scope of Article 161

The powers of the Governor under this Article to grant pardons, reprieves, respites and to suspend, remit or commute sentences is limited to offences against any law relating to matters to which the executive power of the State extends under Article 162 of the Constitution. The power under the Article is confined to the Governor and any provision of law purporting to confer such power on any other functionary will be invalid. Just as in Article 72, the powers under this Article, though judicial in nature are to be exercised by the governor in the exercise of executive functions and in exercising the power, he is not required to give a hearing to the parties in accordance with the rules of natural justice.

The power of pardon is exercised on the advice of the Council of Ministers<sup>5</sup> and the Courts are not competent to inquire into the question whether any, and if so what advice was tendered by the Ministers.<sup>6</sup> The grant of pardon too, is not reviewable by the Courts. As was stated in the case of K.M. Nanavati v State of Bombay:<sup>7</sup>

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5. The Constitution of India, Article 74(1) and 165(1).

6. Ibid, Articles 74(2) and 163(3).

7. AIR 1961 SC 112.

"the power to grant pardon is essentially vested in the head of the executive because the judiciary has no mercy jurisdiction.'

As stated above, the Governor has the power of pardon in respect of offences against any law relating to a matter to which the executive power of the State extends. He has no such power in respect of other offences. Therefore, if in any case it is alleged that the Governor has exceeded his powers by granting a pardon in respect of an offence against any law not relating to a matter to which the executive power of the state extends, the High Court can inquire into that question and decide whether the action taken by him is within the law, even though it will not be possible to make any order against the Governor personally.<sup>8</sup> In other words, although the exercise of the power of suspension or remission is an executive function, it is nevertheless open to the Court to go into the question of the legality of the suspension.

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8. The Constitution of India. Article 361 protects the Governors of States from all criminal and civil proceedings. In State v Kawas Maneskhaw Nanavati AIR 1960 Bom 502(505), it was held that if the action is illegal and invalid, a fresh process may be issued by the court.

It has been argued<sup>9</sup> that the Governor of a State has no power to grant pardon in cases of sentences of death by virtue of Article 72(3) of the Constitution. He only has the power to suspend, remit or commute the sentence. Therefore the President alone has the exclusive power to grant pardon, reprieves and respites in all cases where the sentence is a sentence of death. Both the President and the Governor have concurrent power in respect of suspension, remission and commutation of a sentence of death. In all other matters, that is, where the sentence is not of death, the Governor has all the powers enumerated in this Article. Therefore the Governor has the power to grant pardon or remit the sentence of a person who is sentenced to imprisonment for life.

(e) The role of Ministers in the exercise of the power of pardon

(i) Pardon by the President

As seen above, in Malaysia, the Pardons Boards play an important if not the main role in the exercise of the pardoning power of the Yang di Pertuan Agung or the Yang di-Pertua Negeri of a State. The Pardons Boards are advisory committees, the establishment of which is provided for in the Constitution.

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9. Above, note 1, Vol 3, pg 297.

In India, there is no such advisory committee. The advisory role is played by the Minister. Article 74 of the Constitution of India provides:

(1) There shall be a Council of Ministers with the Prime Minister <sup>at</sup> the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

(ii) Scope and effect of Article 74

It is pertinent at this stage to examine Article 74 itself.

The words of Article 74 standing alone mean that the function of the Ministers is only to advise and it is for the President to accept the advice or not. Therefore the decision in all matters is to be that of the President. It seems however, that if Article 74 is taken along with other provisions of the Constitution, it implies that the President is bound to act according to the advice of his Ministers. Article 78 clearly indicates that decisions are taken by Ministers or Council of Ministers and that their function under the Constitution is not purely advisory. It is not their advice but their decision that is communicated to the President.



The words "aid and advice" in clause (1) of Article 74 therefore, seem to imply, in the context of the Constitution, power to give binding advice, which it would be un constitutional for the President to reject. The President cannot therefore exercise executive power without the aid and advice of the Council of Ministers. He is bound to follow the advice of the Minister.

Under clause (2) of Article 74, a Court cannot enquire as to whether any or what advice was given by the Minister to the President in any matter. But a President can be impeached for violation of the Constitution and it would be unconstitutional for him to refuse to accept the advice of a Ministry which enjoys the confidence of the majority of members of the House of the People. As such it is only in form that the Council of Ministers advises the President. In substance the Constitution vests them with the power of making decisions.<sup>10</sup> The words "aid and advice" are used, more to maintain the dignity of the office of President than to suggest that the advice of the Council of Ministers is not binding on the President.<sup>11</sup>

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10. Although these decisions are enforced in the name of the President under Article 77(1) of the Constitution.

11. Before 1976, Article 74(1) merely said that the Council of Ministers is to 'aid and advise' the President in the exercise of his functions. Article 74(2) declares that no court can inquire into the question whether any, and if so what, advice was

By comparison to the situation in Malaysia, it seems that the Yang di Pertuan Agong has more room to exercise his powers of discretion in relation to his power of pardon. The Constitution of Malaysia<sup>12</sup> provides that the executive authority of the Federation is vested in the Yang di Pertuan Agong, exercisable by him or by the Cabinet or any Minister authorised by the Cabinet. Even though the Yang di Pertuan Agong has to act in accordance with the advice of the Cabinet when exercising most of his functions,<sup>13</sup> he nevertheless enjoys the power to act in his discretion in certain matters.<sup>14</sup> In the matters of pardon, it is the Pardons Board and not the Minister who advises him.

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Cont...

tendered by the Ministers to the President. Article 74(2) thus expressly makes advice tendered by the Ministers to the President non-justiciable. Originally there was no provision in the Constitution to make ministerial advice binding on the President, but, for all practical purposes, this was so. In 1776 Article 74(1) was amended by the Constitution (Forty-Second Amendment) Act, so as to state explicitly that the President shall act in accordance with the advice of the Ministers in exercise of his functions. Thus the present position is that the President has to act on Ministerial advice. The only right the President has is to ask the Council of Ministers to reconsider the matter but he is bound by the advice given thereafter.

12. Article 39.

13. The Constitution of Malaysia, Article 40(1).

14. Ibid, clause (2) of Article 40.

Of course, this argument is purely academic, from the point of view of the provisions contained in the Constitution. Whereas in India, the Constitution expressly provides for the President to act on the aid and advice of the Ministers.

From the practical point of view, the weight attached to the advice or decision of the Pardons Board and Council of Ministers in Malaysia and India, respectively, is the same. In Malaysia, because of the arguments laid down in Chapter III and in India because of Article 74(1), both the Yang di Pertuan Agong and President are "bound" to act on the advice of the Pardons Board or decision of the Council of Ministers.

(iii) Pardon by the Governor of a State

The Governor of a State, just as the President is advised by the Ministers in the exercise of his power of pardon. This is provided for in Article 163 of the Constitution, which states:

- (1) These shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

The function of the Council of Ministers is to aid and (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

(iv) Scope and effect of Article 163

The position of the State Governor as the constitutional head of the State is similar to that of the President as the constitutional head of the Union. There is one difference, that being under this Article there is an exception to the provision as to the Council of Ministers to aid and advise the Governor in the exercise of his functions. This exception relates to functions which the Governor is required to exercise "in his discretion." There are no similar functions contemplated with regard to the President which he is required to exercise in his discretion, independently of the aid and advice of the Council of Ministers. But in relation to the exercise of the power of pardon by the Governor, he has no power of discretion. He has to act on the advice of the Council of Ministers.



The function of the Council of Ministers is to "aid and advise" the Governor in the exercise of his functions. Just as in Article 74, the words "aid and advice" here mean that the Governor is constitutionally bound to act according to the advice of his Council of Ministers. If the Council of Ministers is not consulted, the question is not justiciable in a court of law and the validity of any action taken by the Government cannot be questioned in a court of law. This would constitute an unconstitutional act on the part of the Governor, the remedy for which is not legal action but constitutional action, which is the resignations of the Ministers and a request that the Governor be recalled.

In comparison to the position in Malaysia, there does not seem to be any difference between the exercise of the power of pardon by the Governors in India and State rulers in Malaysia, since in Malaysia too, the State rulers have to act in accordance with the advice of the State Pardons Board.<sup>15</sup>

#### (f) Contents and Effects of a Pardon

##### (i) Contents

The pardoning power in India comprises a variety of acts, such as pardon, reprieve, respite, remission, suspension and commutation.

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<sup>15</sup> Constitution of Malaysia, Article 42(4)(b).

A pardon should also be distinguished from the power of the sovereign to enter a nolle prosequi, which stops a criminal proceeding. A pardon is an act of grace which releases a person from the punishment of an offence. A pardon affects both the punishment prescribed for the offence and the guilt of the offender. In other words, a full pardon may blot out the guilt itself.

(ii) Effects

A pardon may be either full, limited or conditional. A full pardon wipes out the offence in the eyes of the law and rescinds the sentence as well as the conviction. It frees the convicted person from serving any term of imprisonment. It has the effect of restoring the offender to the position in which he would have been in had the crime not been committed.

A limited pardon relieves the offender of some but not all of the consequences of the guilt. It only relieves an offender from part of the penalty but not the conviction. It is in effect similar to a remission.

A conditional pardon is similar to a full pardon but for the pardon to be effective the offender will have to fulfil a condition, normally one of good behaviour. The condition may not extend beyond the term for which the offender was sentenced.

(2) Other powers alongside the power to pardon are powers of reprieve, respite, remission and commutation. The differences will be briefly explained below.

A reprieve means a stay of the execution of a sentence or of the enforcement of a penalty for a temporary period. For instance, a reprieve generally is granted until the birth of the baby where a female prisoner under a sentence of death is pregnant.

A respite means the award of a lesser sentence instead of the penalty prescribed. This is normally due to the fact that the accused has had no previous convictions or the like. Both the court and the executive are vested with this power but in England this power is exercisable by the court and not available in the case of conviction of murder.

A remission reduces the amount of a sentence without changing its character. The guilt of the offender is not effected nor is the sentence of the court affected, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it.

A commutation is a change to a lighter penalty in a different form. A commutation is normally granted on considerations of public welfare.

(g) Whether there can be judicial review of the power of pardon

In G Krishta Goud and J Bhoomiah v State of Andhra Pradesh,<sup>16</sup> two political extremists were convicted of murder and sentenced to death. The President refused clemency and his act of doing so was assailed on the ground that the mercy power is subject to the rule of law, and therefore the President was under an obligation to take into account all relevant factors and reject irrelevant factors. It was argued he had not done this because he had ignored the political motives of the convicts, and that the grant of clemency to some and denial to others was discriminatory.

The Court rejected the arguments and said that the Constitution had empowered the President with powers, the exercise of which excludes judicial review and that it would procedurally be ultra vires as well as an encroachment for the court to enquire into the exercise of that power. However the court may intervene if there is an absolute or arbitrary mala fide execution of public power. In the instant case the court decided there was no "malignancy" or "degraded abuse" of power.

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16. [1976] 2 SCR 73.



In another case,<sup>17</sup> two men were sentenced to death for kidnapping two children for ransom and then murdering them. The President rejected their mercy petitions. It is felt that if permitted the existence of the pardoning power may just undermine the workings of the legal system. It is in effect, an extension of the judicial power. Moreover, a subsequent grant of pardon would only create confusion - is it right to "pardon" an innocent person?

It was argued before the Supreme Court that the power of pardon has a corresponding duty of exercising it fairly and reasonably. The court observed that there is no uniform standard or guidelines by which the exercise of the power of pardon is subject to. The Court also said that the necessity or justification of exercising the pardoning power had to be judged from case to case.

In Kehar Singh's case the Supreme Court held that the question as to the scope of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review. It is the function of the court to determine whether the act of a constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power.

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17. Kuljeet Singh v Union of India AIR 1981 SC 1572.

However, the order of the President under Article 72 cannot be subjected to judicial review on its merits except within strict limitations defined in Maru Ram. (see page 140, above)

Therefore it appears that in India the exercise of pardoning power involves a wide discretion that is beyond judicial scrutiny. The power of the President, in comparison to the Yang di-Pertuan Agong in Malaysia, is even wider, since the President can inquire into the merits of the case and even come to a different decision than that which the courts have arrived at.

#### B. ENGLAND

In England, crimes are wrongs against the Crown, that is, the State. As such, criminal proceedings are conducted in the name of the Crown, and the Crown has two special prerogative rights in relation to criminal cases. First there is the royal power of pardon and second, the Attorney-General, acting on behalf of the Crown, has the power to enter a nolle prosequi in criminal proceedings, whereby the Attorney-General informs the court that he is no longer prepared to proceed with the prosecution.

A pardon in England is granted on the advice of the Home Secretary. The Home Secretary is constitutionally responsible for recommending the exercise of the royal prerogative of mercy to grant either a free pardon, conditional pardon or a remission.<sup>18</sup>

#### (a) The Scope and Effects of a Pardon

##### (i) Scope

The prerogative of pardon can be extended to persons who are convicted of virtually any criminal offence. However it has been said<sup>19</sup> that the right of pardon is confined to offences of a public nature<sup>20</sup> where the Crown is the prosecutor and has some vested interest in the matter at hand. If the Crown wishes to interfere with any private prosecution, then it must do so before conviction by taking over the prosecution and terminating it.

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18. See below for the meanings of, and differences between these three concepts.

19. Halsbury, Laws of England 4th ed, 1974, Vol 8 pg 606.

20. This includes ecclesiastical disciplinary offences.

The Crown is not free to relieve a person from the consequences of a civil wrong. The prerogative of mercy covers criminal law only. An area in which it is unclear whether the power of pardon may be exercised is that of public nuisance. Public nuisance is a hybrid of tort and crime and in most cases of public nuisance it may be difficult to ascertain whether the case is one which is tortious or criminal in nature. Halsbury says that the Crown may not pardon the commission of a public nuisance before conviction whilst it continues, as to do so would deprive the interested citizen of his vested rights.

Two points arise from this. One is that if the proceedings are clearly criminal in character, then the Crown may grant a pardon in cases of public nuisance. Secondly, the limitation imposed on the exercise of pardon here only relates to "advance" pardons rather than pardons granted after conviction. Therefore it seems that if the action taken against a public nuisance is a civil <sup>case</sup> one, the Crown may still grant a pardon provided it is done after conviction. It is submitted that this should not be so since it would defeat the whole purpose of the limitation imposed upon the granting of a pardon in cases of public nuisance of civil character. The rule is that the Crown cannot relieve a person from the consequences of a civil wrongdoing - it should therefore mean that the Crown cannot exercise its royal prerogative of mercy, at any stage before, during or after, a civil matter.



The second area in which the Crown is said to have no power to exercise mercy is the breach of recognisances to keep the peace. A recognisance is "a contract between Her Majesty the Queen on the one hand and the principal and surety on the other, under which the principal and surety undertake the performance by the principal of an obligation on pain of forfeiture of a stated sum of money." It has been said<sup>21</sup> that it is a strange contract if one of the parties to it cannot release the other from his obligations.

"A distinction can be drawn between the general recognisance which protects all Her Majesty's subjects, and the specific, which is designed to afford protection to a named person. If the rationale for the rule is that the Crown cannot deprive the citizen of vested rights, it could be suggested that the Crown should not be free to release a person from the latter but should be free to release from a general recognisance. But in both cases, it seems, the proceeds of any forfeiture of the recognisance belong to the Crown rather than to any named individual, which suggests that the individual does not have any vested pecuniary interest and it follows that the Crown should be free to release from either."<sup>22</sup>

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21. A.T.H. Smith, 1983 Public Law, Aut '83 pg 411.

22. Ibid, pg 411.

The other area in which there exists uncertainty is over circumstances in which the Crown has the power to pardon for contempt of court. Just as in a public nuisance, the Crown has power to pardon criminal contempt, but not civil contempt. The uncertainty is caused by the difficulty to distinguish between the two forms of contempt. In any event however, it is clear that the Crown has power to pardon in criminal cases only.

By analogy to the position in Malaysia, there is no difference here. In Malaysia too, it is quite clear that the power of pardon extends to criminal cases only, since the Constitution expressly provides that the power of pardon covers 'offences.'<sup>23</sup> In any event, as the position stands, all the appeals that have been made to the various Pardons Boards in Malaysia are clearly criminal cases and as such no dispute has arisen (or could arise) to determine the nature of the proceedings.

The difference in approaches between England and Malaysia relating to the scope of pardon is that in the former a pardon may be pleaded before conviction.<sup>24</sup>

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23. See Article 42 of the Constitution, especially clauses (1), (2) and (3).

24. Halsbury, Laws of England, Vol 8 pg 606.

"Even though the power does not at present seem to serve any identifiable constitutional purpose, the prerogative has proved itself to be a remarkably enduring power, and one that can reappear at unexpected moments, and until the advance pardon is expressly abrogated by statute, the possibility that its use will revive at some future time cannot be discounted."<sup>25</sup>

(ii) Effects

In theory there are three different types of pardons, the effect of which is different. These are (1) the absolute pardon, (2) the conditional pardon, and (3) remission of sentence.

(1) Absolute or Free Pardon

The effect of a free pardon is that a conviction will be disregarded, so that, as far as is possible, the person is relieved of all penalties and other consequences of the conviction.<sup>26</sup> A free pardon is normally recommended when there

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25. A.T.H. Smith, Public Law, Aut '83, pg 416-417.

26. Sixth Report from the Home Affairs Committee of the House of Commons, Miscarriages of Justice, H.C. 421 (1981-82), Minutes of Evidence, pg 1. (hereinafter referred to as Miscarriages, Minutes).

are convincing grounds, and not merely doubts, for thinking that a particular accused is innocent. It is not sufficient for the accused to be 'technically' innocent of the offence. It has been a long-established policy that the free pardon should be confined to those who are morally as well as technically innocent. Thus the implication is that the Home Secretary must be satisfied, before recommending a free pardon, that in the incident in question the accused had no intention of committing an offence and did not in fact commit one.

## (2) Conditional Pardon

A conditional pardon excuses or varies the consequences of a conviction, subject to certain conditions. It therefore substitutes one form of punishment for another. This power has been used primarily to commute a sentence of death to one of life imprisonment, a purpose which it still serves in respect of sentences in the Isle of Man and Jersey.<sup>27</sup> Suffice it to say here that the conditional pardon is not much used in practice today. In recent years the granting of a conditional pardon has been simply as a means of commuting a sentence of death, but not as a means of mitigating the effect of a wrongful conviction.

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<sup>27</sup>. Capital punishment for murder was abolished in England by the Murder (Abolition of Death Penalty) Act 1965 and made permanent on the 31st December, 1969.



(3) Remission of Sentence

A remission is a reduction of the amount of a sentence or penalty without changing its character.<sup>28</sup> This kind of remission is referred to as "special remission," to distinguish it from the statutory remission to which a prisoner becomes entitled for good behaviour.

The power to recommend special remission is normally used for reasons unconnected with the merits of the conviction. It is generally awarded on one of a number of grounds such as compassion, which may be shown where a person is released a few weeks early to be with a dying relative or because he himself is dying, or where a woman is expecting a child shortly before her release. Remission is also granted as a reward, as where a prisoner has helped the prison authorities in some way. The power of remission is also used where, due to new information coming to light, doubt is cast on the correctness of a conviction. In such cases the Home Secretary may recommend remission of the remainder of the sentence.

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28. See n. 25 pg 424.

(b) How the power of pardon is exercised

Power to exercise the royal prerogative of mercy was effectively and irreversibly vested in the Home Secretary when Queen Victoria ascended the throne in 1837. Thereafter no serious attempts have been made by a monarch to interfere with the way in which mercy was dispensed in his name. Consequently, although the prerogative is personal to the Sovereign, it has been delegated to the Home Secretary for more than a century.

(i) Powers of the Home Secretary

The Home Secretary has powers to intervene in cases where an accused has been convicted of a criminal offence. The basis of his powers are twofold.

Firstly, the Home Secretary is empowered, under section 17 of the Criminal Appeal Act 1968, to refer an accused who has been convicted on indictment, to the Court of Appeal (Criminal Division), for the determination as to conviction or sentence or both. This process is treated as if it were an appeal by the convicted person.

Secondly, (and this is what we are more concerned with) the Home Secretary, by constitutional convention is responsible for recommending the exercise of the royal prerogative of mercy to grant either one of these three-a free pardon, a conditional pardon or a remission.

(ii) Grounds

The Home Secretary will not normally intervene where normal avenues of appeal to the Court of Appeal have not been exhausted. In cases where the normal avenues are not available and intervention seems justified, the Home Secretary will use his power of reference to enable the Court of Appeal to hear the case. Therefore the Home Secretary will act only where there is new evidence which was not available to and considered by the court which originally tried the case.<sup>29</sup> He may take into account evidence that is legally inadmissible.

The Home Secretary requires a greater degree of proof than that which is required by the Court of Appeal before he acts. The general rule is that the petitioner needs to prove his innocence beyond doubt. If a

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29. Miscarriages, Minutes, pg 20.

petitioner fails to establish his innocence, but raises serious doubts as to his guilt, he may be granted a remission only.<sup>30</sup>

(iii) Procedure

There is absolutely no prescribed form of application for the Queen's Pardon, and it makes no difference to the Home Office whether the plea is handprinted on vellum or scrawled in block capitals on a postcard.<sup>31</sup>

A petition for mercy is normally brought before the Home Secretary by the prisoner himself or his friends on his behalf. This practice is rather new, in view of the fact that before, when the death penalty was involved, the Home Office automatically reviewed every case. The sentencing judge himself may recommend mercy, and sometimes the petition is brought by voluntary organisations such as the National Council of Civil Liberties, and Justice.

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30. Compare this to the position in India and Malaysia, whereby there need not be new evidence before the President or Governor, and the Yang di Pertuan Agung or Ruler agrees to hear the petition for mercy.

31. C.H. Rolph, The Queen's Pardon, Cassell, London, 1978, pg 141.



Theoretically, a petition for mercy may be made (and mercy may be granted) even though an appeal before the Court of Appeal is pending. In practice however, many complaints are rejected at an early stage, the reason being that the normal channels of appeal have not been exhausted.

(c) Whether there can be judicial review of the power of pardon

The courts in England will not inquire into the manner in which the prerogative of mercy is exercised. This is because traditionally the courts will determine the existence and extent of the prerogative power but they will not superintend the manner of its exercise.<sup>32</sup>

The role of the courts and the executive in the exercise of the power of pardon was enunciated by Lord Denning in the case of Hanratty v Lord Butler of Saffron Walden,<sup>33</sup> thus:

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32. S.A. deSmith, Judicial Review of Administrative Action, (4th Ed.) pg 286.

33. [1971] 115 Sol. J. 386.

"The high prerogative of mercy was exercised by the monarch on the advice of one of her principal secretaries of state who took full responsibility and advised her with greatest conscience and care. The law would not inquire into the manner in which that prerogative was exercised. The reason was plain - to enable the Home Secretary to exercise his great responsibility without fear of influence from any quarter or of actions brought thereafter complaining that he did not do it right. It was part of the public policy which protected judges and advocates from actions being brought against them for things done in the course of their office."<sup>34</sup>

Lord Justice Salmond concurred as follows:

"No action for negligence could succeed unless it were shown that the negligence caused damage. The only damage that could be alleged here was that the Crown would have exercised its prerogative of mercy differently. So if the action were allowed to continue the Courts would have to pronounce on the Crown's exercise of its prerogative, something which they would not and could not do."<sup>35</sup>

Therefore, just as in India and Malaysia, in England too, the pardoning power is beyond judicial review.

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34. Ibid.

35. Ibid.

Both in India and England, exercise of the prerogative of mercy is in fact vested in the Ministers, whereas in Malaysia, a special body is set up to advise the Yang di Pertuan Agung or Ruler. The reason why there is a Pardons Board in Malaysia, as opposed to the Ministers advising the Yang di-Pertuan Agung or Ruler or Yang di-Pertua Negeri is so that advice on the exercise of the pardon power vests in an apolitical body. In actual fact, though, the Pardons Board is still semi-political, since the Minister of a State is a permanent member of the Board. To sum up, it would not be far from the truth to say that in all three countries the granting of a pardon basically lies in the hands of another body but just that it is granted in the name of the Sovereign.

In all three countries the basic rules practically run parallel to one another. A difference, if any, lies with the fact that in England, mercy may be pleaded even though an appeal is pending before the Court of Appeal, whereas in both India and Malaysia the rule is that mercy may only be pleaded upon the exhaustion of all legal remedies.

Having said that, it may be useful to note the one major difference between all three countries in relation to the death sentence.

In England, the death sentence has been abolished. For all other offences, it is solely within the powers of the Home Office whether or not to grant any pardons.

In Malaysia, powers to grant pardons in respect of death sentences other than a death sentence under the Internal Security Act, 1960 is determined by the place in which the offence is committed and duly sentenced. If the offence was committed in the Federal Territories of Kuala Lumpur and Labuan the power lies with the Yang di Pertuan Agong, otherwise it lies with the Rulers of the different states.

(a) In India, the power to pardon a death sentence lies only with the President, irrespective of where the offence was committed.



## CHAPTER VI

### SHOULD THE PARDONS BOARD BE RETAINED?

Thus far we have seen how, both in theory and in practice, the Pardons Boards in Malaysia operate. In this concluding chapter the writer will seek to examine whether in the light of the present situation the institution of the Pardons Boards should be retained or otherwise.

The arguments for and against this issue will be discussed. Suggestions for a more effective operation of the Pardons Boards will also be proposed.

#### A. ANALYSIS OF THE PARDONS BOARD

##### (a) The principle underlying pardons

A pardon<sup>1</sup> suggests forgiveness or the excusing of a fault, by the Yang di Pertuan Agong or Ruler or Yang di-Pertua Negeri of a State to a petitioner who has exhausted all legal channels of appeal. The existence of pardon is in fact an acknowledgment that the judicial process is fallible; that the rules of procedure and evidence do not always give rise to a correct decision about guilt or innocence, even when all judicial appeals have been exhausted. This is felt to be the main principle underlying the power of pardon. In short, its

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1. The word 'pardon' here includes commutations, reprieves and respites.

function is to "exact justice" to its fullest. Insofar as justice has been done to the petitioner through the imposition of the sentence passed by the courts, the principle underlying the grant of a pardon thereafter is to afford him (the petitioner) a second chance at rehabilitating himself based on humanitarian grounds.

Taft CJ in Ex Parte Grossman<sup>2</sup> said:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies to vest in some other authority than the court power to ameliorate or avoid particular criminal judgment. It is a check entrusted to the Executive for special cases."

Other than to exact justice, a pardon if granted, may be purely an exercise of mercy, since the aim of the pardoner is to be merciful by declining to exact the full punishment that the law, through the courts, deems appropriate to the offence committed. An example would be the commutation of original sentences that were passed by the courts.

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2. [1924] 69 Law Ed 527, 535.

(b) The case for retaining the Pardons Boards

The main argument in favour of the retention of the Pardons Boards rests mainly on the need and importance of the power of pardon itself. In Malaysia, in the exercise of the power of pardon, the Yang di-Pertuan Agong, Ruler or Head of State usually receives advice from some quarter.<sup>3</sup> And this, it is submitted, is a very important essence of a pardon. Even though the pardoning power is vested in the Yang di-Pertuan Agong and Rulers of the States in the sense that he has the final say in granting a pardon, he cannot act on his own personal judgment. The Constitution requires him to act on the advice of the Pardons Board. It is important that the grant of a pardon should not be a subjective evaluation of one person, no matter how high his status or standing is, in any government. To allow this would be akin to a system of dictatorship, a system to which Malaysia does not subscribe to. It must be emphasized that the power of pardon is discretionary and cannot be questioned in any court of law. As such it is of the utmost importance that

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3. cf Panama and Zambia. In Panama, the Constitution of 1972 through Article 163(6) provides that the power is to be "exercised by the President of the Republic alone," and in Zambia the constitution of 1973, Articles 53, 60 and 61 provide that the President "acts in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority."

whenever a pardon is granted to any particular petitioner, thorough discussion has taken place on the matter. Thus there exists the need for the retention of the Pardons Board to assist the Yang di-Pertuan Agong or Rulers in the exercise of this power.

The Pardons Board, in advising the Yang di-Pertuan Agong or Rulers of States has a heavy responsibility too. The former Attorney-General of Malaysia, the late Tan Sri Abdul Kadir bin Yusuf said once<sup>4</sup> -

*He is still healthy.*

"They have to consider very carefully all aspects of the case in the national and public interest<sup>5</sup>, the nature and gravity of the offence, the circumstances in which the offence was committed and all grounds submitted by their counsel before making their decision."

For instance the granting of a complete pardon, or a commutation of sentence involves a negation of the sentence passed by the courts in accordance with law. It is also of the utmost importance to the petitioner, especially one who is faced with a death sentence. It is therefore strongly felt that the Yang di Pertuan Agong or

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4. The News Straits Times, 4.7.1968.

5. Emphasis added.



Ruler or Yang di Pertua Negeri should not weigh the evidence before him alone. It is for this reason that the Pardons Boards, as advisory bodies, should be retained in the system.

(c) The case for abolishing the Pardons Boards

In a democratic system of government such as Malaysia, it could well be said that the whole notion of pardon is anti-democratic and unnecessary, since in the ultimate the power of pardon allows one person to act and decide as he pleases.

Prima facie, to argue for the removal of the Pardons Boards may involve one of two considerations. One is that the pardoning power vested in the monarch itself should be abolished; secondly the pardoning power should be retained in the Constitution but that the advisory committee, namely the Pardons Boards, should be abolished because it is presently ineffective.

(i) Abolish the power of pardon

Leslie Sebba, in an article,<sup>6</sup> stated that there are both ideological and practical reasons for doing away with the power of pardon.

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6. "The Pardoning Power - A World Survey," The Journal of Criminal Law & Criminology, Vol. 68 1977, pg 83.

"The ideological grounds derived from the fact that the pardoning power appears to be an archaic survival of an earlier era, during which the State was governed by an omnipotent ruler, who might have an occasional urge to demonstrate his benevolent disposition. This seems something of an anomaly in a twentieth century constitutional democracy having a commitment - at least in principle - to a delicate separation of powers designed to ensure independence of the judiciary. This independence would appear to be threatened by vesting in a non-judicial authority the power to pardon offenders duly convicted and sentenced in the course of a judicial process."

According to this submission, the ideological reasons for doing away with the pardoning power are rooted in constitutional theory. As for the practical reasons they are:

"... related to the development of modern penal systems. The pardoning power has historically served a number of functions, most of which are adequately provided for today by other legal institutions which have been developed to meet these needs. For example, the avoidance of imposing criminal liability on persons lacking in mental capacity or acting in self-defense is now governed by the penal code itself.<sup>7</sup> The need to assuage doubts regarding the possibility of a miscarriage of justice is now commonly met by a system of appeals and rehearings before the courts."

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7. In Malaysia it is both under the Penal Code and the Criminal Procedure Code. The effect of acts of a person of unsound mind are to be found in the Penal Code, section 84 and the Criminal Procedure Code, sections 342-352. For discussion on the procedures governing the determination of the sanity of the accused at the time of trial, see "Fitness To Plead" in Criminal Proceedings, Stanley Yeo Meng Heong [1984] 2 MLJ lxxxiv. Acts done in private defence are laid down in the Penal Code, sections 96-106.

It is wholly agreed that the existence of the pardoning power seems to undermine the doctrine of the separation of powers; and that the possibility of any miscarriage of justice would be considerably reduced today by the process of appeals. But no matter how detail the legal process may be to ensure against the possibility of any miscarriage of justice, there is always the chance that a miscarriage of justice can result. After all the aim of the power of pardon is to obtain justice, and if this can be achieved by vesting power in a non-judicial authority, albeit threatening the independence of the judiciary, it is but a small compromise indeed. Of course, great care must be taken to ensure that no abuse is possible. The judiciary should not view the existence of the pardoning power as a demonstration of a flaw in the judicial process. This is important since it must be remembered that the pardoner, when granting a pardon, commutation or otherwise is not in effect saying that the courts have been wrong in sentencing the petitioner to his particular sentence; but that by inflicting less than what the judgment fixed it is hoped that the welfare of the petitioner as well as public welfare will be better served.

In the Malaysian context especially, the granting of a pardon is not necessarily a negation of the sentence passed by the courts, nor is it meant to be an 'attack' on the judicial process. Instead, a pardon or commutation of a sentence when granted is based on humanitarian grounds.



A good example can be seen in the case of P.P. v Lim Hang Seah,<sup>8</sup> a 14 years old boy who was sentenced to death following a conviction under section 57 of the Internal Security Act, 1960. His sentence of death was commuted to detention at the pleasure of the Yang di-Pertuan Agong. He was placed at the Henry Gurney School and to remain there until he reaches the age of 21 years. Even though the reasons for any grant of pardon or commutation of sentence are confidential, in the instant case it is quite obvious that the main factor for the granting of the commutation of sentence was due to his tender years at the time of the commission of the offence.

#### (ii) Abolish the Pardons Boards

The power and function of the Pardons Boards extend only to the tendering of advice to the Yang di Pertuan Agong or Ruler or Yang di-Pertua Negeri, as the case may be. This is provided for in Article 42(4) of the Constitution. The Constitution, through clause (9) requires the Pardons Boards to consider any written opinion of the Attorney-General before tendering their advice.

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8. [1978] 1 M.L.J. 68.



These two clauses are fairly straightforward both in nature and coverage. However, Clause (8) which provides that a Pardons Board is to meet in the presence of the Ruler or Yang di Pertua Negeri may give rise to practical difficulties in its effect. As has already been argued in Chapter III, because of the fact that the Ruler himself presides over the discussion and most likely, participate in the arguments put forth, the final decision may well be that of the Pardons Board and not exclusively that of the Ruler's. Two factors arise in assessing the appropriateness or otherwise of this situation.

Firstly, if mercy is intended to be dispensed by the Ruler only in name, meaning that the actual exercise of the power vests in some other authority, namely the Pardons Boards, there is then no abuse of power or function with regard to clause (8). In England although the prerogative is personal to the Sovereign, it has been delegated to the Home Secretary and any exercise of mercy by the Crown is only in name. So too in India, where, though the power of pardon vests in the President and Governor of the States, the Constitution of India provides that both the President and the Governor are bound to act in accordance with the advice of the Council of Ministers.

Here in Malaysia, because there is no such clear delegation, confusion arises as stated above, as to whose decision it is in the ultimate to pardon or not to pardon? There is a need therefore, to review Clause (8) and affirm the actual rationale behind it.

Secondly if the exercise of the power to pardon is intended to be personal to the Ruler, clause (8) may have the effect of undermining that position. The courts in Sim Kie Chon and Chiew Thiam Guan<sup>9</sup> have clearly stated that the function of the Pardons Boards is merely to tender advice. Consequently if the Pardons Board does more than simply tender advice, then it is an abuse practically of both power and function by the Pardons Boards, as envisaged by Clause (8).

However, this does not apply in the case of the States Pardons Boards. They would not be acting in excess of their power and function since clause (4)(b) expressly states that the Ruler or Yang di Pertua Negeri shall act on the advice of the Pardons Board. This carries with it the mandatory implication that the final decision of the Ruler is only "ceremonial" based upon the deliberations of the Pardons Board.

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9. [1985] 2 M.L.J. 385, [1986] 1 M.L.J. 494 and [1983] 2 M.L.J. 116 respectively.

The observations would only concern the Federal Pardons Board and the Pardons Board for Security Offences that would seemingly be acting beyond their power and function through the operation of clause (8).

It is therefore submitted that an abolition of the Pardons Boards per se due to the possibility of abuse through clause (8) of Article 42 of the Constitution is unwarranted. The problem lies not with the Pardons Boards as such, but with the intended effect of clause (8).

#### B. SUGGESTIONS FOR REFORM

##### (a) Amending clause (8) of Article 42

If the exercise of the power of pardon is to be made personal to the Yang di Pertuan Agong, an amendment to clause (8) is called for. It is suggested that the Pardons Board should meet without the Yang di Pertuan Agong and upon reaching a 'decision' should then ask for an audience with His Majesty to tender their advice. In this way, the ultimate decision will properly be that of His Majesty's.

It would also be useful to include the provision that upon receiving advice from the Pardons Board the Yang di Pertuan Agong shall not be obliged to act in accordance with that advice.<sup>10</sup>

At present the members of a Pardons Board weigh the effect of a pardon as against the national and public interest. The Pardons Board has no power to inquire into the merits of the case when deliberating upon the issue of whether to advise the pardon or otherwise of a particular petitioner. Should we in Malaysia, allow the Yang di-Pertuan Agong or Ruler or Yang di-Pertua Negeri to inquire into the merits of any particular case as in India, before a final decision is reached? The test would then be that the Yang di-Pertuan Agong or Head of State need not act on the advice of the Pardons Board if, upon considerations relating to the merits of the case, the Yang di-Pertuan Agong or Head of State strongly feels that to heed the advice tendered by the Pardons Board would be unjust to the petitioner in question.

Naturally the issue that arises now is whether we should allow the Yang di-Pertuan Agong or Head of State to inquire into the merits of a case. This is a difficult

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10. In Kenya the Constitution provides that the President may consult the Advisory Committee but "he shall not be obliged to act in accordance with the advice of the committee."



issue to determine. Suffice it to say here that to allow it would seem like an usurpation of judicial powers. On the other hand, disallowing it need not mean that the chances of a pardon being granted is necessarily reduced. Currently, the Yang di-Pertuan Agong or Head of State does not inquire into the merits of a case and maybe it would be best to leave the position as it is and consider other more persistent problems.

**(b) Change in the composition of the Pardons Board**

"A special Pardons Board was set up to be one of the safeguards to ensure against abuse of the new Essential (Security Cases) Regulations (gazetted on Saturday 5th October 1975). The Pardons Board will be headed by the Prime Minister, Deputy Prime Minister (Tun Hussein Onn), Law Minister and Attorney-General Tan Sri Abdul Kadir Yusof, Labour and Manpower Minister Datuk Lee San Choon and Communications Minister Tan Sri V Manickavasagam. The five-man board will advise the Yang di Pertuan Agong, who is the only person empowered to grant pardons, reprieves and respites under the regulations."<sup>11</sup>

"The powers given to the Government in the regulations will be used to preserve democracy and the interest of the people. The Government's sincerity was questioned in setting up the Pardons Board since it consisted of the very men who initiated the regulations in the Cabinet; and thus how could any accused have faith in the Pardons Board? If the Government is sincere and wants an effective Pardons Board then its members should be drawn from the public and be men and women of high moral standing and integrity."<sup>12</sup>

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11. Extract from The Straits Times, 9 October 1975.

12. Extract from The News Straits Times, 20 December 1975

The Pardons Boards at both federal and state level have the Attorney-General and the Chief Minister of the state as permanent members. The three other members are appointed for a term of three years, and are eligible for reappointment.<sup>13</sup> The criticisms that have been directed with regard to the members of the Pardons Board have usually been that of the Attorney-General being both the prosecutor and then sitting in on the Pardons Board to hear the petition for mercy. The arguments relating to this situation have already been discussed in Chapter III. The criticism in this Chapter is aimed at the appointment of the three other members of the Board. It is quite common for medical practitioners to be appointed as members in the States Pardons Boards. As for the Federal Pardons Board, Ministers have normally been appointed for the three-year period. It is strongly felt that the time has come for a change in trend.

One of the factors that may have a bearing in favour of the petitioner who is petitioning for mercy is his conduct and behaviour as a prisoner. As such it would be most appropriate to have the Director General of Prisons or the Commissioner of Prisons to become one of the members of the Pardons Board. He could supply the Pardons Board with information regarding the behaviour and

13. Article 42(5) and (6) of the Federal Constitution

attitude of the prisoner whilst serving sentence and based on that information, may well argue to the effect that the sentence of the prisoner should not be altered, (therefore probably supporting the view put forward by the Attorney-General) or that the prisoner should be pardoned, (therefore giving a different opinion from that of the Attorney-General). The Attorney-General sits on the Board and gives expert opinion - that of the law. By the time a case comes up to the Pardons Board it is arguable whether there will still be need for legal advice proper? In any case, by having the Director-General of Prisons as a member, the Board would have the benefit of hearing another 'expert' opinion - that of the conduct of the prisoner after conviction. The word 'expert' here is used in the sense that the Director-General has actual contact with the prisoner and he therefore is able to assess the behaviour of the prisoner, albeit subjectively.

It is also suggested that a psychiatrist constitute the other member of the Board. He too, would be able to furnish expert opinion relating to the mental state of the prisoner and ascertain whether a pardon is desirable. A psychiatrist is a person who is specialised in a branch of medicine that addresses itself to the treatment of people suffering from emotional or behavioral problems. He will be able to assess the conduct of a petitioner from a different angle as opposed to the Attorney-General and Commissioner of Prisons.



The third member may be selected from the public, one who has high moral standing. It could be another doctor, someone from the social welfare department, a criminologist, who would be able to furnish evidence as to what type of sentence would probably best suit the petitioner in order to 'rehabilitate' him, if any, or even a Minister.

At the same time, since each case is considered on its own merits and no two cases can be exactly the same, it would also be a good idea if the members are not fixed. The Pardons Board could have a 'revolving' panel, where the composition of a particular Pardons Board at a particular time is dependent upon the nature of the case that is to be deliberated upon. Thus it is suggested that a list of names be established like a jury. Of course this would only apply to the three other members as prescribed by Clause (5) of Article 42, as both the Attorney-General and the Chief Minister for the particular State are permanent members.



(c) The exercise of the power of pardon should be subject to some rules

Even though the pardon is said to be an act of grace, in that a pardon if granted is not so much an attack at the judicial process, but more on humanitarian grounds, the exercise of the powers should be subject to some rules or guidelines. It should not be left in a "lawless state" as it is now. By subjecting it to some guidelines it will provide certainty. This arguably may infringe the discretionary powers of the pardoner but as things stand the pardoner, that is the Yang di Pertuan Agong or Rulers or Yang di Pertua Negeri do not have full discretion anyway.

Laying down guidelines will at least ensure that two cases of similar facts will obtain similar results. The guidelines should revolve around procedural matters, which includes the extent or amount of "evidence" needed concerning the petitioner before the Board meets. But to lay down the guidelines is itself problematical. At present, the Pardons Board is not guided by any guidelines or rules in reaching a decision. Their decision can be termed as the product of an exercise of discretionary justice.

In this respect it has been said that

"... much discretionary justice is without rules because no one knows how to formulate rules. Much discretionary justice is without rules because discretion is preferred to any rules that might be formulated; individualized justice is often better, or thought to be better, than the results produced by precise rules...

Even when rules can be written, discretion is often better. Rules without discretion cannot fully take into account the need for tailoring results to unique facts and incumstances of particular cases. The justification for discretion is often the need for individualized justice."<sup>14</sup>

The 'catch' however, is that once there are rules or guidelines attached to the pardoning power, judicial review will automatically follow. Courts then would have the power to review the process by which the pardon or otherwise is granted.

It is but a mere opinion that a power to review by the courts would not necessarily undermine the actual power to pardon. The courts will only be able to question the procedural aspects of the exercise of the power to pardon. If the procedural requirements are met the courts can do nothing to alter the ultimate decision of the pardoner.

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14. Davis, K.C., Discretionary Justice - A Preliminary Inquiry, Louisiana State University Press, 1970, pg. 15-17, 55.

The courts so far are of the opinion that the power of pardon is an act of grace and therefore not questionable in any court of law.

However, the Yang di Pertuan Agong is a "creature" of the Contitution and he therefore holds a statutory office. The same argument goes for the Pardons Boards, which are statutory bodies; and like any other statutory bodies, both the Yang di Pertuan Agong and the Pardons Boards should be subject to the rules of administrative law.

Alternatively, having seen that discretionary power is necessary, the problem perhaps would lie in the better control of this necessary discretionary power or the elimination of unnecessary discretionery power. As has been suggested,

"The principal ways of controlling are structuring and checking. Structuring includes plans, policy statements, and rules, as well as open findings, open rules, and open precedents... Checking includes both administrative and judicial supervision and review ... confining discretionary power does not lie in statutory enactments but in much more extensive administrative rule-making..."<sup>15</sup>

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15. Ibid.

(d) The scope of pardonable offences should be reduced

At present, persons convicted of "any offence" may appeal to the Pardons Boards. Even though in practice only those convicted of serious offences actually appeal to the Pardons Boards, a clause should be inserted in Article 42 limiting the type of offences and sentences that qualify to make an appeal. Even with the few cases (compared to the number of cases that go to the courts) that appeal, the delay in time before the final decision is reached is already discouraging, the problem would be worsened should those convicted of less serious crimes decide to appeal as well.

Only those who are convicted of serious crimes, which entail severe punishment, ought to be able to appeal for clemency.

(e) Notification of Outcome and Delay

The current situation is that only the petitioner and the prison authorities are notified of the outcome of the petition. It is suggested that the public ought to be notified<sup>16</sup> of the outcome of a petition for pardon,

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16. This was done in the 1960's and early 1970's in the newspapers but the practice stopped, and the reason is not known.



especially so if a pardon is granted. This will at least have the effect of removing social stigma on the petitioner so that he could begin 'a new life.'

To go even further, maybe the reasons for a decision should be made available, not as a matter of course, but upon request, which will have the effect of incorporating public accountability in the area of pardons.

On another aspect of social stigma, it is to be noted that persons who have been convicted of serious crimes, such as murder or any crime the punishment for which is life imprisonment; possess a brown-coloured identity card as opposed to the familiar blue one. Following the grant of an absolute pardon the colour of his brown identity card must be changed, otherwise he will still be subject to discriminations in society.

To remove the anomalies in the present system, it is suggested that having a separate piece of legislation governing all aspects of the Pardons Board such as jurisdiction, composition and procedural requirements replacing the one in the Constitution may greatly improve the functioning of the existing one.

Alternatively, the present system should be retained but improvement is most needed in the area of the administrative machinery. Upgrading the administrative machinery will at least ensure that the number of practical problems will (it is hoped) be reduced.

Another area in which reform is urgently needed is with regard to the time taken between the date of petition and the date of the decision. Currently the time taken for the Yang di-Pertuan Agong or Ruler to decide is too long. For instance, in the most recent case of an appeal by a Briton to the Penang Pardons Board,<sup>17</sup> the sentence of death was passed in March 1987. On appeal to the Supreme Court, the Supreme Court rejected his appeal in April 1988. He then appealed to the Pardons Board for clemency. Therefore it has taken about 15 months before the result of his petition is known. Delays are definitely the worst part of the whole operation of the Pardons Board. Amendments are urgently needed to ensure that a petition does not take too long once it reaches the Pardons Board. After all, it is hardly the case that the Pardons Board is overloaded with cases, as only those whose sentences are severe make an appeal.

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17. The Sunday Star, 16 July, 1989, where Derrick Gregory was sentenced to death for trying to smuggle heroin.

(f) Should Muslims be subject to a different system?

Having seen how the Pardons Board operates, its difficulties and what could be done to improve the system, likewise the Muslim Pardons Board may need some improvement as well.

As seen earlier, the Yang di Pertuan Agong and Rulers as head of States are also the head of the religion of Islam in the states. Article 42(10) expressly provides that the Yang di Pertuan Agung shall exercise the power to grant pardons, reprieves, respites, commutations, suspension and remission of sentences imposed by any court established under any law regulating Islamic religious affairs - namely the Syariah Courts - in the States of Malacca, Penang, Sabah, Sarawak or the Federal Territories of Kuala Lumpur and Labuan. The head of the religion of Islam in the other states are the respective Sultans.

To date there has never been a petition for pardon following a sentence passed by the Syariah Courts. It is not clear whether the Yang di Pertuan Agong or Rulers, in exercising the power of pardon to Syariah matters, have to act on the advice of the Pardons Board. In any case it is hereby submitted that a separate Pardons Board for Muslims should be set up, since Islamic law prescribes different rules for Muslims than what has been laid down above relating to pardons.

As stated previously in Chapter III, in hudud crimes the right to grant or receive a pardon exists for as long as the offence has not been brought to the courts. The right to grant a pardon only lies with the victim. For example, in the offence of theft, the thief may be granted a pardon only by the person whose goods were stolen and only if the victim has not brought the offence to the knowledge of the authorities. When the offence is brought to the courts, no pardon is admissible.

The next category of crimes in Islam is Qisas. An example of a Qisas crime is murder. Under Islamic Law, if murder is committed, pardon may be given only by the victim's heir. The Ruler or head of state has no power to pardon Qisas crimes. If the person against whom the murder is committed has no heir or guardian, the head of state will be treated as his guardian and only then can the head of state pardon the murderer.



The punishment for murder in Islam is death, as Qisas carries the retributionist principles of sentencing. However Islam prefers its believers to pardon Qisas crimes and opt for the alternative punishment for the murderer, namely Diyat, which is compensation in monetary form. This way, it will ensure that the family of the deceased will be provided for, since if the punishment of death is carried out, it would leave two families in dire financial straits.<sup>18</sup>

The heir may also choose to forgo Diyat, which means that the murderer will go unpunished.

A good example of Qisas and Diyat appeared in the newspapers recently<sup>19</sup> where an 18 year old boy was acquitted of a charge of causing grievous hurt to his schoolmate after he and his father publicly apologised to the victim's family in the juvenile court. The boy was charged under section 325 of the Penal Code. The forgiveness given in pursuance of the public apology is in effect the pardoning of a Qisas crime.

The father of the victim waived monetary compensation as well.

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18. This of course would be true if the two deaths involve the men (or father) in both families and he was the sole breadwinner for the family.

19. The New Straits Times, 7 July, 1989.

When the father of the victim forgave the commission of the Qisas crime, the right for Diyat exists but since the father chose to forgo Diyat as well, thus explaining the acquittal of the 18-year old boy.

In such a situation the role of the head of a state comes into play. He may impose punishment for Ta'zir, as a deterrent measure to future offenders. It is only in respect of Ta'zir crimes that the state has pardoning powers. The state has the discretion to alter the sentence to the extent of mere admonition. The granting of a pardon is subject to one limitation, that is the pardon must not prejudice the right of the aggrieved person. The pardon should result in the promotion of public good and the hindrance of evil.

The practice of pardon according to Islamic law can be seen in Kelantan,<sup>20</sup> but only in respect of Ta'zir offences. In all the other states of Malaysia criminal law is still very much the civil law, as opposed to Islamic Law.

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20. Kelantan Syariah Criminal Code, 1985.

The writer foresees no administrative problems in implementing a different pardons system for the Muslims in the country, since pardon for the serious crimes lies in the hands of the victim or his next-of-kin and any new enactments are only needed to regulate pardons relating to Ta'zir offences.

An example of a case which has been brought to the Pardons Board but which would entail different consequences under Islamic law is the case of Datuk Mokhtar Hashim, who was convicted of the murder of one Datuk Taha. Datuk Mokhtar is currently serving imprisonment for life after his sentence of death was commuted by the Yang di Pertuan Agung on the advice of the Federal Pardons Board.

Applying Islamic principles, this crime would be one of Qisas and only the next-of-kin of Datuk Taha has the right to pardon Datuk Mokhtar. In the event that Qisas is forgone, the family of Datuk Taha could claim for Diyat as financial compensation. Datuk Mokhtar could even be a free man now assuming Datuk Taha's family chooses to forgo both Qisas and Diyat.

It is hoped that Muslims in Malaysia adhere to the Islamic rules rather than the civil law in matters pertaining to pardons, since to follow the civil law may lead to consequences totally forbidden by the teachings of Islam.

### C. CONCLUSION

The recommendations proposed in the earlier pages may be summarised thus -

1. The procedure whereby the Yang di-Pertuan Agong presides over the meeting of a Pardons Board gives rise to difficulties in determining the limit of the advisory powers of the Pardons Board. It also raises doubts as to whether the final decision is truly that of His Majesty's. In view of these problems Clause (8) of Article 42 of the Federal Constitution needs to be amended to clarify the matter.
2. The non-fixed members of the Pardons Board should be people who are experts in the field of assessing human behaviour, such as psychiatrists. It follows naturally that they should be people of high moral standing in the society.



6. Membership or appointment need not be for a specified period. A list of names should be established and members of any particular Pardons Board at any given time should be selected from a revolving panel.

3. The Attorney-General or his representative should not sit as a constituent member of any Pardons Board. This is important so as to promote impartiality and integrity in the administration of justice. Alternatively, the role of the Attorney-General should be limited to only the submission of a written opinion regarding the particular case, to the Pardons Board.

4. The exercise of the power of pardon should be subjected to some guidelines. This is to ensure that similar cases will be decided in similar ways.

5. If guidelines are laid down governing the exercise of the power of pardon, then judicial review should be available, to ensure that the guidelines are complied with. The courts however, should have no jurisdiction to question the decision itself but only the manner in which the power of pardon, with regard to the guidelines, is exercised.

6. Not every person who is convicted of an offence should be able to petition for clemency, but only those convicted of very serious crimes.
7. There is an urgent need for the Pardons Board to avoid delay in making any decision. It is of the essence that applications or petitions for clemency be considered as soon as possible after they are made.
8. Islamic law prescribes a different system of pardons for Muslims. As such, there should be a separate Pardons Board for the implementation of pardons in accordance with Islamic law.

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Newspapers

APPENDIX 1

Berita Times, 1 June 1981

1364620/135/133

The New Straits Times, 4 July, 1968

137/135/134/SULIT 013

The New Straits Times, 20 December, 1975The New Straits Times, 2 September, 1982

14.7.1979

The New Straits Times, 31 August, 1987The New Straits Times, 7 July, 1989The Straits Times, 14 October 1963The Straits Times, 25 November 1963The Straits Times, 3 December 1964The Straits Times, 31 August 1967The Straits Times, 9 October 1975The Sunday Star, 16 July 1989

In accordance with provisions of Rule 115 of the Revised Rules, 1951, I respectfully forward this appeal letter together with Report from Justice's original Report for presentation to the High Court and hope of Justice for his due consideration.

For your information this is the second appeal. The first appeal was granted and justice was done being to the satisfaction of the court.

Pos Office Box No 212

8364620/155/153

(2)d1m. IPP/KES/BDN/SULIT 015

14.7.1979

CONFIDENTIAL

Secretary of State,  
State of Perlis,  
State Secretariat,  
Government Head Office  
01990 KANGAR

Sir,

Re: Appeal for Pardon from CONVICT RAMLI BIN MOHAMAD,  
No. T. 199-83 HL

In accordance with provisions of Rule 112 of the Prison Rules, 1953, I respectfully forward this appeal letter together with Extract from Convict's Original Record for presentation to His Royal Highness the Raja of Perlis for his due consideration.

2. For your information, this is the second appeal, the first appeal being granted and sentence commuted from hanging to life imprisonment on 24.7.1984.

Signed  
(ZAI ABDUL LATIFF BIN IBRAHIM)

**REPORT ON CONVICT**  
**Ramli bin Mohamad**  
**Convict No. T.199-83 HL**

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Convict No. T.199-83 HL Ramli bin Mohamad was imprisoned in Alor Star, Kedah on 20.10.1982 after being sentenced to death upon conviction for trafficking in dangerous drugs under section 39(b)(1)(a) Dangerous Drugs Act, 1952 by the Alor Star Supreme Court. On 21.2.83, subject was moved from Alor Star to Taiping Prison.

While in Taiping prison, subject appealed to His Royal Highness Tuanku Raja Perlis and on 24.7.84, sentence was commuted to life imprisonment together with eight strokes of the cane.

Since subject was removed from Death Row, he had been working in the carpentry workshop until today. His work and conduct are good and satisfactory. He is an industrious convict who is willing to cooperate with other convicts and also his supervising officers.

signed  
 (JAMALUDIN BIN HJ. MD. RAMTHAN)

Ramli bin Mohamad  
 Convict No. T.199-83 H.L.  
 Carpentry Workshop  
 Prison Training Centre  
 34000 Taiping, Perak

Date: 27 Jun 1987

His Royal Highness  
 Raja Perlis Indera Kayangan  
 Tuanku Syed Putra Ibni Almarhum Syed Hassan Jamalullail  
 DK, DKM, DMN, SMN, SPMP, DK (Selangor), DK (Kelantan), DK  
 (KEdah), DK (Pahang), DK (Brunei), SPDK (Sabah), DP  
 (Sarawak), DK (Negeri Sembilan), DK (Johor), DPSS  
 (Sarawak), DK (Perak), DK (Trengganu)

Your Majesty, I implore upon you to consider my appeal, that my sentence of life imprisonment be taken to commence from my date of arrest, which is February 5, 1980. At present my sentence commences on October 16, 1982. It is my deepest wish that your Majesty would consider this appeal of mine.

Your Majesty, I was arrested together with two of my friends at batu 18, Jalan Padang Besar (Utara), Perlis, in a house at No. 1, Institut Penyelidikan Perhutanan Perlis, on February 5, 1980, as stated in the Criminal Trials File of the Alor Star, High Court, because of the offence of trafficking in 6561.1 gm of opium under section 39B(1) Dangerous Drugs Ordinance 1952 and the court has sentenced me to death by hanging on October 16, 1982. On October 24, 1984, due to your Majesty's good grace as the Chairman of the Pardons Board, State of Perlis, my sentence was commuted to life imprisonment and 8 strokes of the cane. I would like to appeal now for this sentence to commence from February 5, 1980 and as a result of which, the period I spent in prison, 2 years 10 months, be taken into account.

Your Majesty, since the date of my arrest, I have spent seven years in prison, and during that time I have had several bitter experiences and experienced hardship in life due to the demise of my father, my mother being stricken with disease and my divorce from my wife. I am also anxious about the condition of my children, who are at present with their grandparents. Your Majesty, all these bitter experiences have taught me a lesson and made me realise and remorseful for all that I've done. I am quite advanced in age now and I hope that with your kind indulgence I will be released much earlier and will then be able to be with my family. Your Majesty, with the



expertise I had gained in carpentry and wood carving and the religious education I had obtained while in prison, I assure you that I will be able to live like other members of society. I hope these details will be sufficient as a basis for consideration of my humble appeal. . . 123

Lastly, I beg upon your Majesty's good grace and kind indulgence so that my appeal be considered, so that my suffering be put to an end and so that I may return to my family as a person useful to his society, religion and country.

I end with all due respect and forgiveness.

I remain your servant always

signed

(RAMLI BIN MOHAMAD)

## PRISONS DEPARTMENT, MALAYSIA

## EXTRACT OF DETAILS FROM ORIGINAL RECORD

1. Convict No: T. 199-83 HL. Warrant No.: 125
2. Name: Ramli bin Mohamed  
Address: 1166, Sg Rambai, Bkt Mertajam, P.W.  
I.C. No: 4355647 (Blue)
3. Entry Date: 16.10.82
4. Offence: Trafficking in dangerous drugs under section 39(B)(1)(a) Dangerous Drugs Act 1952
5. Sentence: Death  
28.11.83: Federal Court Appeal No. 47/82 - Appeal Dismissal  
24.7.84: Death sentence commuted to life imprisonment and 8 strokes of the cane with effect from 16.10.82 by HRH Tuanku Raja Perlis
6. Date sentence passed: 16.10.82
7. Name of Court and Place: Supreme Court, Alor Star, Kedah
8. Fine: -
9. Date of Expected Release: E.P.D. 16.2.1996.  
L.P.D. 15.10.2002.
10. Age: 31
11. Race: Malay
12. Religion: Islam
13. Education: Standard V, Malay
14. Occupation: Rubber tapper
15. Identifying body marks: mole on neck  
scar on left cheek  
mole on forehead  
scar on right abdomen  
scar on right knee

16. Weight: at point of entry: 55kg Height: 1.67m
17. Previous Offences: Nil At point of release: -
18. Offence while in prison: Nil
19. Date and time of release: -
20. Doctor's Report: Fit to continue prison sentence without endangering health
21. Other matters: Mohamed bin Ibrahim  
(Father)  
No 1166, Sg Rambai  
Bt Mertajam

Above particulars certified as true.

Date: 27.6.1987

signed  
DIRECTOR OF PRISON

## SENTENCE APPRAISAL BOOK

Sentence Appraisal once every 4 years  
In accordance with section 6(g)  
Prison Rules made under Cap. 35.

Prison No: A. 670/83 JL (KJ: 357/87) State: Kedah

Name: Syed Abu Bakar Syed Mahamud Court: Sessions,  
Alor Star

Offence: Section 39B(1)(a) Dangerous Drugs Act 1952

Previous Offences: -

Sentence: Life Imprisonment and two strokes of the cane

Earliest Parole Date:  
6.4.1994

Latest Parole Date:  
5.12.2000

Amount of prison offences  
during last 12 months \_\_\_\_\_  
since imprisonment \_\_\_\_\_

Pardon granted during  
last 12 months \_\_\_\_\_  
since imprisonment \_\_\_\_\_

## Date for Appraisal

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_



SUMMARY OF OFFENCE OF CONVICT SYED ABU BAKAR  
BIN SYED MAHMUD, IC: 3709780 -  
SG PATANI RPT: 13654/80  
DIP NO: 1000/80

---

Acting on information received, on 6.12.80 at about 3.00 pm, Inspector Salleh bin Md Jani from the Head Office of the Sg Petani District Police Department with his team raided an un-numbered house at Kampung Tebu Sungai Patani. At the time the police arrived there was witnessed, in front of the house a male Malay (the accused) running towards the house and Inspector Salleh saw him throw a packet out of a window in the house. At that time, the police moved in and retrieved the packet. When opened, the packet contained 1 plastic packet which contains 350 cartons believed to be opium and the said man is the owner of the house named Syed Abu Bakar bin Syed Mahmud IC: 3709780, age 30 (4.3.50). At the time of raid, there were two women in the house, wife of accused named Melah binti Awang Kechik, IC: 2736020 (21.5.49) and mother of accused named Sharifah Pok binti Syed Omar, IC: 1824548, age 66.

Subject was tried and found guilty of offence under section 39B and was sentenced to life imprisonment and 2 strokes of the cane. Sentence was passed on 11.6.83.

Subject is a drug trafficker in Sg Patani and also an opium addict since the 60's to the time of arrest. In his cautioned statement, accused admitted to keeping opium. Subject, at that time, does not possess permanent employment.

**CONVICT'S BACKGROUND**

Convict is 36 years old. Born on 4.3.1950 in Kampung Dulang Besar, Yan Kedah, later lived in Kampung Tebu, Sungai Patani, Kedai. Educated up to standard 6 Kampung Tupai National School, Sik, Kedah. Convict was married and divorced in 1980, with no children.

Works as trishaw driver during the day and as fruit seller in night market during the night, with income of \$400 per month.

Due to social freedom and a lack of religious education convict was involved in drug trafficking activities, arrested and sentenced to life imprisonment and 2 strokes of the cane for Drug Trafficking under section 39B(1)(a) Dangerous Drugs Act 1952 by Sessions Court, Alor Star on 11.6.83.



## APPRAISAL OF CONVICT'S CONDUCT

At present, convict is working at a cane workshop which is a joint-venture between the prison and a shop. An industrious worker and follows all orders given. He is a person of good character and is always clean from time to time.

Industrious and has confidence in himself when doing work given to him. Has broad outlook in furthering himself in his field and this makes him capable in the field of making cane furniture. He is also able to instruct other convicts in the field of making cane furniture.

He is also industrious in his religious obligations and willing to work in furthering this field. He studied religion from the prison's religious teacher.

signed

(CANE WORKSHOP OFFICER)



## DIRECTOR OF PRISON'S REPORT

Convict is placed at cane workshop. An industrious person in the performance of his duties. Always trying to upgrade the quality of his furniture. Receives all advice and instructions very well.

Relationship between himself and prison officials and other convicts satisfactory. Convict is very adaptable with everyone. He is neat and clean in appearance.

However, it is suggested that convict continue with his sentence.

signed  
(SENIOR SUPERINTENDENT  
PRISON DEPARTMENT)

**REPORT OF MEDICAL OFFICER**

## REPORT OF DIRECTOR OF PRISONS

Still young of age and has far to go in his sentence. Expected release on 6.4.94. I do not support any pardon at this time.

signed  
(MEDICAL OFFICER)



ORDER OF CONTINUATION OF LIFE IMPRISONMENT



*[Signature]*  
.....  
SULTAN OF THE STATE OF KEDAH

WHEREAS in Sessions Court Arrest Case No. 15/81 before the Sessions Court at Alor Setar, Kedah, Syed Abu Bakar bin Syed Mohamad on the 11th June, 1983 convicted of the offence of trafficking dangerous drugs punishable under section 35B(2) of the Dangerous Drugs Act, 1952 (Revised 1980) and was thereupon by the said Court sentenced for the said offence to suffer life imprisonment from date of arrest (6.12.80) and two strokes of rotan :

AND WHEREAS THE SAID Syed Abu Bakar bin Syed Mohamad appealed against the said conviction and sentence of life imprisonment being Kedah Criminal Appeal No. 73/1983 to the High Court of Malaysia.

AND WHEREAS the said High Court on 27th day of February, 1985 dismissed the appeal.

AND WHEREAS the Pardons Board of the State of Kedah on the 4th day of March 1987 considered the facts of the said case and on the Quadrennial Review Sentence, Rule 55, Prison Rules, 1953 and advised that the sentence of life imprisonment be continued.

AND WHEREAS it is in my judgment expedient that the said sentence of life imprisonment should be continued.

NOW, THEREFORE, I, SULTAN HAJI'ABDUL HALIM MU'ADZAM SHAH IBNI ALMABRUM SULTAN BADLISIAHI, DK., DKH., DKL., DKK., DK. (Kelantan), DK. (Pahang), DK. (Selangor), DK. (Perlis), DK. (Negeri Sembilan), DK. (Johor), DK. (Terengganu), DK. (Perak), DP. (Sarawak), SPM., SSDK., DMS., Sultan of the State of Kedah acting in accordance with Article 42 of the State Constitution and in exercise of the powers vested in me thereunto enabling DO BY THESE PRESENTS ORDER that the said sentence of life imprisonment upon the said Syed Abu Bakar bin Syed Mohamad be continued in accordance to law.

IN WITNESS WHEREOF I have superscribed by name and affixed my Seal this 15th day of July 1987.

By His Highness' Command,

*[Signature]*  
MENTERI BESAR,  
KEDAH



**CONFIDENTIAL**

State Secretary  
State of Perlis  
Office of State Secretary  
Government Head Office  
01990 Kangar

Sir

**Re: Appeal for Pardon Against Sentence From Convict  
CHE ANI BIN ITAM Bil. A. 1712/87 HL**

In accordance with conditions in Rule 112 of Prison Rules 1953, I respectfully submit, together with this appeal letter, Extract from Convict's Original Record and Report on convict from Director of Prisoans, Alor Star for presentation to His Royal Highness the Raja of Perlis for his due consideration.

2. For your information, this is the first appeal.

Your Majesty,

signed  
(SHAMSUDIN TAN SRI MURAD)

Your Majesty,

I have three (3) children with my wife. My eldest child, Nalina, 14, is now in the school. My second child, Nuzulh, 12, is now in the school. My third child, Nuzulh, 10, is now in the school. I am very much concerned about my children's condition and I am also very much concerned about my family. I hope you will be able to help me in this matter.

Che Ani bin Itam  
 Convict No. A. 1712/87HL  
 Intan Terpilih Building  
 Kedah Prison Department  
 05350 Alor Stra  
 Kedah

Date: 24th April 1988

His Royal Highness

Tuanku Syed Putra Ibni Almarhum Syed Hassan Jamalulail  
 D.K., S.P.M.P., D.K.M., D.M.N., S.M.N.,  
 D.K., (Brunai), D.K. (Selangor), S.P.D.K. (Sabah),  
 D.K. (Kelantan), D.P. (Sarawak), D.K. (Kedah), D.K.  
 (Pahang)  
 D.K. (Johor), D.K. (Negeri Sembilan), D.P.S.S. (Sarawak),  
 D.K. (Perak), D.K. (Terengganu).

Re: Application for commutation of Life Sentence of  
 Che Ani bin Itam, Convict No. A 1712/87 HL, Alor  
 Star Prison, Case No. 62/81, Section 4 Firearms  
 Act 1971, Sessions Court Kangar, Perlis

Your Majesty, I respectfully and humbly implore upon you  
 so that with your good grace and kind indulgence, my  
 sentence of life imprisonment could be commuted.

Your Majesty.

For your information I have been arrested together with a  
 friend in Kampong Arau, Perlis on January 3, 1979 for  
 committing robbery with the use of firearms under section  
 4 of the Firearms (Increased Penalties) Act, No. 37 of  
 1971. My accomplice was charged under sections 392 and  
 397 Penal Code. I was tried at the Sessions Court  
 Kangar,, Perlis, and was found guilty and sentenced to  
 life imprisonment (without parole) with 6 strokes of the  
 cane. My accomplice was sentenced to 3 years jail. I  
 have appealed to the Alor Star High Court on April 22,  
 1984, but my appeal was dismissed.

Your Majesty,

I have three (3) children still schooling. My eldest  
 child, Azlina, is 15 years and is studying in Sekolah  
 Menengah MUkim Tajar; my second child, Mohd Azlizat is 10  
 years and schooling in Sekolah Kebangsaan Tok Keling and  
 my third child, Azimah, aged 9 is schooling in the same  
 school. I am very much aggrieved at my children's  
 condition and it has also been the source of anxiety for  
 my family. I implore upon your better judgment in this  
 matter.

Your Majesty,

As a Muslim, I have never lost hope and I always pray to Allah that my prayers be answered. Apart from Him, only Your Majesty is the source of my hope that I may be freed from this pain and sorrow.

Your Majesty,

I would like to outline the life of my family since I have not been at their side. Their lives have been very bitter because their daily needs now rests entirely upon my wife. The sorrow have increased because recently my wife, upon whom my children depends, was involved in an accident on July 26, 1987 at Pekan Simpang Empat, Kangkong Alor Star as a result of which, her right thigh was fractured. She was admitted to the Alor Star General Hospital for 7 months and the doctors have advised her to refrain from heavy work.

Your Majesty,

I am filled with remorse and fully realise the folly of my actions during my term in prison, which has been almost 10 years. I am getting older and all my children are almost adults. Through the various rehabilitation programmes organised by the prison I feel it has been effective in guiding and encouraging me and the other convicts to return to society as a useful citizen.

Your Majesty,

I am an uneducated man, as a result of which I got involved in criminal activities, because I was unaware that the offence I committed carried such a heavy penalty according to law.

Your Majesty,

I do not wish to question the decision of the court, the Judges or the country's laws, but I am only stating the normal views of a husband and father. Based on the above factors I present my appeal for your consideration. My family and I place our hopes upon you and look towards you so that our suffering will end.

Your Majesty,

That is all I wish to present and I end with all respect and forgiveness and the fervent hope that you will consider my appeal.

Signed.

(CHE ANI BIN ITAM)

PRISONS DEPARTMENT MALAYSIA  
EXTRACT OF DETAILS FROM ORIGINAL

RECORD

1. Convict No: A. 1712/87 HL      Warrant No. 299182
2. Name:      Che Ani bin Itam  
Address:      Kampong Tok Keling, Identity Card No:  
Tokai, Kedah      4625413
3. Entry Date:      17.2.79
4. Offence:      Exhibiting firearms when committing robbery  
under section 4      Firearms (Increased  
Penalties) Act, 37/71
5. Sentence:      Life imprisonment and 6 strokes of the cane
6. Date Sentence Passed:      10.9.81
7. Name of Court and Place:      Sessions Court, Kangar, Perlis
8. Fine:      -
9. Date of expected release:      -
10. Age:      35
11. Race:      Malay
12. Religion:      Islam
13. Education:      Standard VI, Malay
14. Occupation:      Retired
15. Identifying Body Marks:      one long scar on abdomen; one  
big scar on left arm
16. Weight:      at time of entry: 124 lbs      Height:      5' 4<sup>1</sup>/<sub>2</sub>"
17. Previous Offences:      -      At time of Release:      -
18. Offence while in prison:      -
19. Date & Time of release:      -



20. Doctor's o/e g/c satisfactory. Patient has been report: losing weight for the past few months. Urine for sugar tested and found sugar +++. He was referred to hospital and blood for sugar was taken and he was put on anti-diabetic treatment.

21. Other matters: -

Above Particulars Certified as True.

Signed.  
(DIRECTOR OF PRISON)

With reference to your letter of 21 December 1964 regarding the above matter, I apologise for the late reply.

2. Together with Mr. [Name] I replied the answers to the questions forwarded by you. I hope the answers will be able to assist you.

Yours faithfully,

(ATTENDING MEDICAL OFFICER)

## APPENDIX IV

## ATTORNEY-GENERAL

Miss Norchaya Hj Talib  
 Faculty of Law  
 University of Malaya  
 59100 Kuala Lumpur

Madam,

**Assistance in Academic Research -  
 The Functions and Powers of the Pardons Board**

With reference to your letter of 31 december 1988 regarding the above subject, I apologise for the late reply.

2. Together with this letter I append the answers to the questions forwarded by you. I hope the answers will be able to assist you.

Yours faithfully

signed  
 (ATTORNEY GENERAL MALAYSIA)

## Questions on the Pardons Board

Pursuant to Clause (5) Article 42 of the Federal Constitution, the Attorney-General may delegate his functions as a member of the Board to any other person.

- (a) Is there any criteria that must be satisfied by the 'delegated member', if any?

Strictly no. However, I am of the view that the person must be legally trained.

- (b) Who is normally appointed to take the place of the Attorney-General?

Solicitor-General or the State Legal Adviser of the relevant State.

- (c) Is the appointment for only one meeting of the Board or for a certain period, therefore should there be a few meetings of any of the Pardons Board, the same person will sit in for the Attorney-General?

Normally for one meeting. However, the practice has been for the person delegated with AG's functions to attend the subsequent meeting which considers the unfinished business of the previous meeting, if any.

- (d) Is the advice of the Attorney-General, specified in Article 42(9), binding on the Pardons Board? Would it be correct to say that more often than not, his advice would be adhered to?

No. It is true to say that more often than not, his advice is adhered to.

---

2. It seems that Ex-Officio members may be appointed to the Board.

(a) Do all the State Pardons Boards have Ex-Officio members?

Yes.

(b) What functions do the ex-officio members exercise?

Like any other member of the Board.

(c) What is the criteria for becoming an ex-officio member?

He must be the A.G. & the Chief Minister or Menteri Besar of the relevant State. In the case of the Jemaah Pengampunan Wilayah Persekutuan, the ex-officio members are the A.G. and the Minister responsible for the Federal Territory.

3. The Yang di Pertuan Agong will preside whenever the appeal concerns an offence committed under the Internal Security Act, 1960 or the sentence was passed by military court. Which Pardons Board is involved in this situation?

For security cases, the relevant Pardons Board is the Jemaah Pengampunan Bagi Kes-Kes Keselamatan. As for the sentence passed by military court, the Yang di-Pertuan Agong acts on the advice of the Cabinet.

(a) If it is the State Pardons Board, where does it sit?

In the place determined by the Sultan or the Governor.

4. What are the factors that are taken into consideration before the Pardons Board reaches its decision?

All matters relevant to the case, the Accused and such other matters raised by the Accused, if any.



5. Suppose it is agreed that a remission would be granted, who actually decides the number of months or years to remit?

The Yang di-Pertuan Agong/Sultan/Governor on the advice of  
the relevant Board.

6. What is the ratio (if any) of the number of cases in which the sentences remained the same to those cases where the sentences were reduced (or the offender was pardoned)?

I have no record.

7. Does the Board function on a scheduled basis i.e. at certain periods in a year or is it on "each appeal basis" i.e. on demand?

If and when there are cases for consideration of the Board.

8. Does the Board normally reach a decision at the end of a particular session, or does the Board normally meet for a few times before a decision is reached?

Normally at the end of each session.

9. Do all the Pardons Board in Malaysia operate on the same principles? Does any Board operate on Islamic or any other principles, and if so, how do these Boards differ from the rest?

On the same principles. The answer to the second question is 'no'.

## STATE OF KELANTAN

Professor Madya Dato' Nik Ab Rashid b Nik Majid  
No 97 Jalan Telok Pulau  
Bukit Seputeh  
58000 Kuala Lumpur

Dato'

Application for Research into Pardons Board,  
State of Kelantan

I respectfully refer to the letter from Norchaya Hj Talib which was forwarded to me by your goodself, regarding the above matter.

2. Application for interview regarding the procedure and other matters concerning the Board need not be held as answers to the questions forwarded are sufficient.

signed  
(KELANTAN STATE SECRETARY)

7. Normally, when an appeal is made based on a convict's right under rule 112, Prison Rules 1953, prison authorities will give their views either in support or otherwise of the convict's appeal. From a statistical point of view, does the Board generally reach a decision based on the appraisal from prison authorities?

The Board is free to make any decision without being bound by the view of any party.

8. Apart from the appraisal from prison authorities and other relevant facts, what other guiding factors are used by the Board to arrive at its decision? Is the doctrine of precedent applied?

The Board must take into account any written opinion of the Attorney General [Art. 42(9) Federal Constitution) before advising the Sultan. Precedent is not applied.

9. In coming to a conclusive decision, does the Board decide by a majority or must the decision be unanimous?

The power of pardon is bestowed upon the Sultan by the Federal Constitution and this power is exercised on the advise of Council. The question whether council makes a majority or unanimous decision does not arise.

10. How long does it take for the Board to arrive at its decision?

Time for making decision depends on circumstances of each case.

11. Must the Board sit again to deliver its decision?

No need.

12. Is it true that the Council of Pardons, Kelantan is administered in accordance with principles of Islamic Law? If true, how does the Council differ from other Pardons Board in other States?

Not true. The administration of the Council of Pardons is in accordance with the Constitution.

STATE OF PERAK

Puan Norchaya Hj Talib  
Faculty of Law  
University of Malaya  
59100 Kuala Lumpur

Madam,

**Application for Research into Pardons Board, State of Perak**

I am directed to refer to your letter dated 18 August, 1988, regarding the above matter.

2. This administration has no objections to your conducting research regarding the Pardons Board, State of Perak regarding matters of procedure only. Regretfully, we are not able to provide information regarding specific cases.

3. Together with this is appended the questionnaire which has been completed for your further action. You may communicate with the author thereof in case of problems or doubts regarding the subject.

signed

(DEPUTY STATE SECRETARY II)



# WRITTEN QUESTIONS REGARDING PARDONS BOARD

1. When an appeal for pardon has been forwarded to the Board, what is the procedure taken.

See Annexure.

2. Who are the members of the panel of the Board?

Membership is in accordance with Article 42 Rule 5 Federal Constitution.

3. Are the members of the Board permanent members?

Apart from ex-officio members, length of service of 3 members appointed by the King is 3 years. The appointment may be reviewed after 3 years. Refer Art 42 Rule 6 Federal Constitution.

4. Must the King preside over each case or does he have the right to appoint another to take his place?

The Sultan, as Chairman of the State Pardons Board has to preside over each meeting of the Board personally. Refer Art. 42, rule 8.

5. Usually, how many members of the Board are there when the Board sits?

State Pardons Board will sit when all the members are present.

6. Is the appeal conducted in an inquisitorial manner where members of the Board question representative of the appellant, or in writing or others?

At present, the Board considers and makes its decision based on written documents.

7. Normally, when an appeal is made based on a convict's right under rule 112, Prison Rules 1953, prison authorities will give their views either in support or otherwise of the convict's appeal. From a statistical point of view, does the Board generally reach a decision based on the appraisal from prison authorities?

Prisons appraisal is given consideration in all appeal cases. Consideration is also given to views of the Attorney General and other factors related to the case. It is not possible to say whether the prisons appraisal is given priority over appraisals from other parties.

8. Apart from the appraisal from prison authorities and other relevant facts, what other guiding factors are used by the Board to arrive at its decision? Is the doctrine of precedent applied?

This question is unclear.

9. In coming to a conclusive decision, does the Board decide by a majority or must the decision be unanimous?

The Board is unanimous in all its decision.

10. How long does it take for the Board to arrive at its decision?

This depends on each case and a definite time frame cannot be given.

11. Must the Board sit again to deliver its decision?

Not necessarily, except if the case is postponed to a future meeting. Normally, the Board makes an additional decision regarding the implementation of its decision with immediate effect.

## Annexure

1. Appeals received from several sources or parties based on certain law/rules. Among others, they include:
  - (i) Section 281 Criminal Procedure Code; and
  - (ii) Rule 111 to the Prison Rules, 1953
2. When document is received from the Federal Court, the matter will be referred to the Attorney-General for his views under Section 281, Criminal Procedure Code. Views of the Attorney-General and other relevant documents will be brought for the Board's consideration. Every case in which the death sentence is imposed will be considered by the Board although no appeal is received directly from any party.
3. Appeal under Rule 111 of the Prison Rules 1953 can be made either by the convict himself or close relations such as parents, children or husband/wife. When an appeal is received under this Rule, the Board's secretariat will obtain information regarding background and views from prisons department regarding the convict. View of Attorney-General will also be sought. All information received will be forwarded to the Board for consideration and due decision.
4. After the Board has decided, the decision will be relayed to the appellant for his information.